CHAPTER 21
INTERNATIONAL HUMAN RIGHTS LAW

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INTRODUCTION

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BOX 21.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law

Learning objectives: Understanding the evolution of international human rights law as a separate branch of international law and a separate domain of global government.

BOX 21.2 Interactive Exercises

Access *interactive exercises for this chapter*[1] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

1 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

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A. INTRODUCTION

This chapter traces back the evolution of human rights from its inception leading to structural changes within international law, away from State-centrism towards a stronger focus on the individual, to its recent crisis and current developments. It shows how the divide between human rights and other branches of international law (e.g. trade, investment, development) is the result of numerous failures, which date back to the aftermath of the Second World War, proceeded during and beyond the Cold War, and continued up into the 21st century.[2]

B. THE HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW

I. THE FAILURE OF THE UNITARY DESIGN OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE SPLIT INTO 'GENERATIONS' OF RIGHTS

The Universal Declaration of Human Rights (UDHR)[3] is generally agreed to be a milestone document in the foundation of international human rights law. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations. As a single document, it encapsulated the progressive realisation of democracy and development through the universal and effective recognition and observance of rights. And it made no distinction between mostly 'negative' (freedoms from), classical civil and political rights, and (essentially 'positive': freedom of) social, economic, and cultural rights, or collective rights. It was, however, proclaimed as a not binding document:[4] several authoritarian States abstained, while even liberal democracies were not ready to commit themselves to binding legal obligations. Then came the Cold War and human rights became yoked to the ideological conflict between the United States and the former Soviet Union.

Deep political disagreement and profoundly different conceptions of rights between the Western and non-Western world – which included the former socialist States but also the newly independent, developing States – led to the sub-division of human rights into three categories: the 'first-generation' rights, known as civil and political rights; economic, social, and cultural rights as 'second generation' rights; and 'group rights' as 'third generation' rights.

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2 On the history of international law, see González Hauck, § 1, in this textbook.

3 UNGA Res. 217 A (III) (1948) GAOR 3rd session, UN Doc. A/810 (1948).

4 On non-binding rules in international law, see Lima, Kunz, and Castelar Campos, § 6.4, in this textbook.

It took 18 years for the signature of the International Covenant on Civil and Political Rights (ICCPR)[5] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[6] in 1966, and then another decade for their entry into force. The adoption of these first international human rights treaties marked the setting aside of collective rights and the formal split between the first generation of rights in the ICCPR and the second generation of rights in the ICESCR. The vision of rights into 'generations' has remained also at the regional level, particularly within the Council of Europe, long considered the most advanced system for human rights protection. Yet, the UDHR is widely recognised as having inspired, and paved the way for, the adoption of more than 70 human rights treaties, all containing references to it in their preambles, both at the global level (see the United Nations human rights system[7]) and regionally (the African human rights system;[8] the European human rights system;[9] the Inter-American human rights system;[10] the Arab and Islamic human rights system;[11] and the Asian human rights system[12]).

II. THE 'INFLUENCE' OF HUMAN RIGHTS DURING THE DECOLONISATION PERIOD AND THE END OF THE COLD WAR

It is generally acknowledged that during decolonisation[13] beginning in the 1960s and more prominently in the 1970s and 1980s, human rights became to exercise their influence and became a major force in international relations.

The Soviet Union ratified the ICCPR in 1973 and 1975 set the beginning of the Helsinki process. Despite their lack of formal status as international treaties setting out binding commitments, the Helsinki Accords provided a framework for the scrutiny of human rights practice in the former Soviet Union and its satellite States. In 1977, the US Congress passed a law conditioning certain types of aids to compliance with human rights. The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979,[14] based on a General Assembly resolution sponsored by 22 developing countries and some East European States.

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5 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

6 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

7 On the universal human rights system, see Ananthavinayagan and Baranowska, § 21.2, in this textbook.

8 On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

9 On the European human rights system, see Theilen, § 21.4, in this textbook.

10 On the Inter-American human rights system, see Kahl, Arévalo-Ramírez, and Rousset-Siri, § 21.5, in this textbook.

11 On the Arab and Islamic human rights system, see Rachovitsa, § 21.6, in this textbook.

12 On the Asian human rights system, see Rachovitsa, § 21.7, in this textbook.

13 On decolonisation, see González Hauck, § 1, in this textbook.

14 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

The Convention against Torture[15] – a milestone in the protection of the most fundamental human rights – was signed in 1984. Following a proposal by Poland and other countries of the Soviet bloc, the Convention on the Rights of the Child[16] was opened to signature in 1989.

III. THE DIVIDE BETWEEN THE THEORY AND PRACTICE OF HUMAN RIGHTS IN THE LAST DECADE OF THE 20TH CENTURY

In the post–Cold War, post-decolonisation era, the existence of an international human rights regime was well established. While not all countries had ratified all human rights treaties,[17] most countries ratified most of them. Nowadays, some treaties have been ratified nearly by all States (most notably, the ICCPR with 173 State parties and the Convention on the Rights of the Child with 196) and each of the six major human rights treaties has more than 150 parties.

In 1993 the United Nations Office of the High Commissioner for Human Rights was established. Its task includes preventing human rights violations and securing respect for all human rights, promoting international cooperation and coordinating related activities throughout the United Nations, and leading efforts to integrate a human rights approach within all activities carried out within the United Nations system.

Taking on human rights–related causes became one of the most important functions of non-governmental organisations (NGOs)[18] around the world. NGOs with a focus on human rights issues increased in number and activities, working with or against governments in developing agendas for action, participating in treaty negotiations, investigating, and reporting human rights abuses and offering direct assistance to victims of those abuses, lobbying political officials, corporations, international financial institutions, intergovernmental organisations, and the media. NGOs became also increasingly involved in providing services, such as training programmes on the rule of law and humanitarian assistance in disaster areas.

This was also the era when the legal theory of *jus cogens*[19] (Latin: 'peremptory norms') emerged and started to permeate diplomatic intercourses, judicial arguments in national and international fora, and the academic debate to include the prohibition of torture, genocide, and other serious breaches of human rights. More broadly, the '90s were characterised by the general blossoming of multilateralism and have become known as the 'golden age' of international law and international institutions.

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15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

16 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

17 On international treaties, see Fiskatoris and Svicevic, § 6.1, in this textbook.

18 On non-governmental organisations, see Chi § 7.6, in this textbook.

19 On legal sources in general, see Eggett, § 6, in this textbook.

Notwithstanding these developments at the normative, institutional, operational, and theoretical level, however, the decade between the end of the Cold War and the end of the 20th century sets the beginning of a divide between the legal aspirations and the actual implementation of human rights. While the 1970s had seen the human rights movement acquiring prominence in international law, in the 1990s there was consensus that all countries must respect human rights; yet some of the worst atrocities of our modern era are committed in many parts of the world, including within the European borders.

Countless international crimes were committed by all sides to the conflict in the former Yugoslavia in 1991. In 1994, the Rwandan genocide, during the Rwandan Civil War, which had started in 1990, killed between 500,000 and 1,000,000 Rwandans constituting an estimated 70% of the Tutsi population. Following the dissolution of the Soviet Union on 26 December 1991, the establishment of the Russian Federation was marked by the First Chechen War (1994–1996), which set the prelude to the ten-year-long Second Chechen War (1999–2009), with estimates of military and civilian casualties varying in the number of tens of thousands.

Another manifestation of the rising divide between human rights theory and practice is in the response to the Chinese government's armed repression of the political unrest in Tibet in 1987–1989 and violent suppression of the pro-democracy movement at Tiananmen Square in June 1989. Western countries imposed severe economic sanctions and arms embargoes on Chinese entities and officials, which led in turn to a spiral of harsher measures of suppression of other protests around China and heavier condemnation by the West. Initially, the US adopted strong measures against the Chinese government, including the suspension of military sales, the cancellation of high-level visits and regular meetings between the two countries, a request to stop all new loans from the International Monetary Fund and the World Bank, the revocation of China's most favoured nation status and the connection of the issue of human rights with trade. In 1994, however, the Clinton administration decided not to link these two issues and the 'American bilateral monitoring' of Chinese human rights conditions officially ended. It was not well into the 21st century that Western countries were again to impose significant sanctions related to human rights violations in China.

IV. AUTONOMY OR ISOLATION FROM OTHER DOMAINS OF GLOBAL GOVERNANCE? THE 'EFFECTIVENESS' CRISIS OF HUMAN RIGHTS AT THE DAWN OF THE 21ST CENTURY

By the turn of the century, most States had ratified the majority of the most important human rights treaties. Institutionally, the Human Rights Council was established in 2006 to replace the Commission on Human Rights – long criticised for including some of the most prominent human rights violators and the uneven selection of situations subject to its scrutiny. While special procedures continue to monitor, examine, advise, and publicly report on specific rights or country-specific situations under the Universal Periodic Review, set up by the Human Rights Council, all State

members of the United Nations are subject to a periodic assessment in relation to all human rights issues – not just those enshrined in treaties to which they are parties. Human rights institutions also flourish and expand at the regional level. Thanks to the automatic right of individual application introduced in 1998, the European Court of Human Rights can hold the then 47 member States accountable for violations of the rights and freedoms guaranteed under the European Convention of Human Rights to over 800 million persons. The Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the Arab Human Rights Commission are all functioning institutions overseeing compliance with their respective human rights charter. Law schools – where future generations of judges, lawyers, and lawmakers are formed – include international human rights courses in their curricula – which in turn prompts private litigation, in the US and elsewhere, based upon human rights violations. Human rights language is used everywhere and is routinely invoked to criticise governments in political and diplomatic discourse, while human rights NGOs continue to grow in number and in the outreach of their reporting, lobbying, and advocacy activities.

Yet, the beginning of the 21st century was indelibly marked by two events: the September 11 attacks of 2001 by the Islamic extremist group al-Qaeda against US targets – which exposed the fragility of the most powerful democracy, triggering the most geographically and temporally undefined war in history, the war against international terrorism – and the global financial shock of 2008 with the ensuing economic crisis.

And human rights practices worsened in many parts of the world. Following a period of deteriorating relations between Russia and Georgia, a war erupted between Georgia, Russia, and the Russian-backed self-proclaimed Republics of South Ossetia and Abkhazia in August 2008. Another war erupted in 2014, when Russia seized Crimea from Ukraine violating the territorial integrity of the former Soviet Republic. Africa is afflicted in the East by a major armed conflict in the Darfur region of Sudan that began in February 2003 between rebel groups and the government of Sudan, which they accused of oppressing Darfur's non-Arab population. The government responded to attacks by carrying out a campaign of ethnic cleansing against Darfur's non-Arabs. The North is marked by the Arab Spring, a series of anti-government protests, demonstrations and armed rebellions that commenced in Tunisia in 2010 and spread, in early 2011, across North Africa and the Middle East, as a response to oppressive regimes and low living standards. One of the consequences was the multi-State military intervention in Libya in March 2011, led by the North Atlantic Treaty Organization, and the ensuing chaos that still dominates the country. As part of the Arab Spring in the Middle East, the Syrian civil war grew out of a popular uprising against the regime of President Bashar al-Assad in March 2011 and the brutal response of the security forces, which dragged the country into an ongoing full-scale civil war. At the same time, the pillars of European integration are challenged by the ensuing influx of migrants and refugees, terrorist attacks and its own war against terrorism, and ultimately, Brexit and the rise of anti-establishment populist parties.

The distance between the theory and practice of human rights became more profound, posing dramatically the question of the 'effectiveness' of the international human rights regime. Human rights themselves are increasingly the object of criticism,[20] with some States even backlashing against the European Court of Human Rights or the Inter-American Court of Human Rights.

1. The 'Effectiveness' of International Human Rights Law

Human rights rules and principles differ from those governing international trade, investment, development, or the protection of the environment in their normative structure, institutional settings, and dispute settlement mechanisms. International human rights law is relatively weak compared, for example, to the regime of international trade or direct investment abroad. No competitive market forces push countries towards compliance, nor are States generally consistent in their application of human rights standards to their foreign policy, and only exceptionally employ political, economic, military, or other sanctions to coerce other countries to improve their human rights records. This is because, contrary to trade openness or the protection of foreign investments, a State and its citizens are hardly affected if the human rights of citizens of other countries are violated in the territory of their home State. This is the conundrum and the eternal dilemma of human rights, which impose obligations *erga omnes* (Latin: 'towards all') – respect for which should be imposed in the name of the international society as a whole – but which in fact are generally enforced only when specific national interests are at stake. And without powerful States taking a strong interest in the effectiveness of human rights, there is little cost for countries with a poor human rights reputation to ratify human rights treaties as a symbolic gesture of goodwill, while maintaining their actual practices in reality.

Human rights did bring about significant positive changes in State behaviours *visa-à-vis* (French: 'face-to-face') individuals in the second half of the 20th century. Accounts, however, differ as to the precise contribution of international law to the improvement of human rights conditions worldwide in the second half of the 20th century. Unlike growth in gross domestic product, import and export data and foreign direct investment stocks and flows, the effectiveness of human rights is hardly measurable because numerical values are not entirely attributable to human rights practices. The development of human rights indicators by international organisations[21] does not fundamentally alter this picture. It is also difficult to deny that human rights improvements on the ground in various areas of the world in the last decade of the 20th century were not the product of the human rights movement, but are rather attributable to economic growth, the collapse of communism, and other offsetting factors. And, at the beginning of the 21st century, international human rights law is undergoing a profound crisis.[22]

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20 On critique of human rights, see Ananthavinayagan and Theilen, § 21.8, in this textbook.

21 See e.g. the OHCHR, Human Rights Indicators. A Guide to Measurement and Implementation (2012).

22 Beth A Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (CUP 2012).

2. COVID-19 and New Technologies

All international law fields are affected by the pervasiveness of the new technologies, as discussed in depth elsewhere in this textbook.[23] The internet and social networks can both significantly facilitate and impede the exercise of human rights. They offer a powerful means for society and individuals to express their rights, but also a new, online environment in which such rights can be curtailed by powerful States, public and private institutions, and individuals. As a consequence, international human rights rules need to be interpreted and adapted and new rules need to be enacted in order to ensure cybersecurity and to protect against hate speech, misinformation, disinformation, incitement of violence, and other digital content that can also cause real-world harm. New technologies have also contributed to make both small- and large-scale human rights breaches well detected and documented, with no corresponding decline, however, in human rights breaches. Also, the human rights implications of artificial intelligence and big data, due to their enormous scope and global reach, could not be overestimated. This phenomenon had been going on for several decades, but modern technologies increased incrementally over the second decade of the 21st century, and the outbreak of COVID-19, even before it unleashed its catastrophic economic and social consequences, precipitated it.

BOX 21.3 Advanced: COVID-19 and Human Rights

While human rights are more important than ever in times of crisis, the COVID-19 pandemic exposed gaps in respecting the fundamental rights to health, education, employment, and social protection across society. Measures taken to curb its spread to safeguard public health and provide medical care to defend the human rights of health and of life itself limited fundamental freedoms to an extent rarely experienced in peacetime.

C. EFFORTS AT REUNITING HUMAN RIGHTS WITH OTHER DOMAINS OF GLOBAL GOVERNANCE

As highlighted above, the history of international human rights law is primarily a story of separation of human rights from other realms of international law. One of the causes of their ineffectiveness is precisely in its relative isolation from other domains of global governance. Hence, it is desirable to overcome such a separation.

23 On international law in cyberspace, see Hüsch, § 19, in this textbook.

I. BRIDGING EXISTING DIVIDES FROM WITHIN THE HUMAN RIGHTS REGIME

With a view to filling the considerable gap between the recognition of human rights and their implementation on the ground, the UN has put great emphasis, in the first quarter of the 21st century, on the universality, indivisibility, and interdependence of human rights. The principle of universality means that human rights shall enjoy universal protection across all boundaries and civilisations, regardless of political, economic, or cultural systems. Indivisibility implies that all civil, cultural, economic, political, and social rights are equally important and that the improvement in the enjoyment of any right cannot be at the expense of the realisation of any other. Human rights are seen as interdependent because the level of enjoyment of any one right is considered as dependent on the level of realisation of the other rights.

While very few would not wish theoretically for a world where all rights are equally protected, respected, and fulfilled for everyone, the debate is intense at the level of implementation and enforcement. There is no evidence that the adoption and promotion of these principles by the United Nations was ever informed by empirical facts. Indeed, it is possible to fully implement or secure certain human rights (e.g. the right not to be enslaved or tortured) without fully implementing or securing other human rights (e.g. the right to education or food), and vice versa. The realisation of rights requires choices as to ways in which to implement them and to what extent, and by employing which resources.

BOX 21.4 China's New International Human Rights Diplomacy

A more radical attempt at bridging the divide between human rights and international economic and development law and a fundamental challenge to the universality of human rights is China's 'cultural relativism' and collectivist conception of human rights, including its emphasis on 'development first'. Along with the former Soviet Union, China contributed to the rise of the second generation of rights and played an important role in the three-generation debate. After Tiananmen Square, however, human rights had become a structural weakness that China had to overcome through active diplomacy. In the 21st century, China still promotes the concept that human rights must be 'based on national conditions, with the right to development as the primary basic human right', a point emphasised in the Beijing Declaration in 2017. As part of its broader effort to redefine its role on the world scene since the turn of the millennium, China aims to establish itself as an international human rights world champion, with the Human Rights Council as the natural arena for the display of such a move – a dimension that has received little attention so far.

II. REUNITING HUMAN RIGHTS WITH TRADE, INVESTMENT, AND DEVELOPMENT THROUGH FREE TRADE AGREEMENTS, SUSTAINABLE DEVELOPMENT GOALS, AND OTHER TOOLS

For 70 years, the development of international legal rules was the main strategy to promote respect for and observance of human rights. International human rights law continues to grow, enriching itself with new treaties, declarations, and resolutions, because States, international organisations, and NGOs continue to feel a need for such international instruments covering certain areas of human rights.

Many countries, however, also began to negotiate bilateral and regional trade agreements, which primarily aim to establish or further deepen preferential economic relations between the parties, but also include chapters on core human rights, the environment and development. It is too early to assess this new generation of free trade agreements with respect to their stated aim of fostering trade and investment while at same time promoting human rights, particularly labour rights, the protection of the environment, and other third generation rights (such as the right to clean water and other essential goods, usually provided by State public services). Whether they will be successful or not, they represent a clear sign that there exists a need to 'reunite' within a single normative framework these multiple areas of the law.

A number of Western States have also introduced a series of new unilateral measures in order to ensure respect for human rights around the world, such as bans on the import of goods suspected to have been produced with forced labour or as a result of other human rights violations, and corporate due diligence requirements, which aim to anchor human rights in companies' operations and governance. These are also tools which aim to link human rights to international trade and the economic realm, more broadly.

In the same perspective, following the Millennium Development Goals adopted in 2000, the 2030 Agenda for Sustainable Development set, in 2016, the Sustainable Development Goals (SDGs): 17 global goals covering social and economic development issues including poverty, hunger, health, education, global warming, gender equality, water, sanitation, energy, urbanisation, environment, and social justice. The right to development has thus been linked to economic growth and poverty reduction, rather than political rights and personal freedoms. It is also linked to the right to security. This is another important recognition that the furtherance of development away from international cooperation in economic matters is an unattainable goal and that international trade and investment are human rights' most natural allies.

D. CONCLUSION

At the dawn of the 21st century, international human rights law seemed to have lost much of its influence and ability to bring about changes in the human rights situation

around the world. Yet recent developments, particularly in the last decade (most prominently, the advent of new technologies and their applications, the SDGs, and Western countries' new set of unilateral measures) have set the ground for a general return of human rights to the centre of international politics and the public debate. This is in principle a welcome development and one that can contribute to reunite human rights to other domains of global governance and hence to make international human rights law more effective.

BOX 21.5 Further Readings and Further Resources

Further Readings

- A Ciampi, 'The Divide Between Human Rights, International Trade, Investment and Development Law' (2018) 61 German Yearbook of International Law 251
- BA Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (CUP 2012)
- DL Shelton, *Advanced Introduction to International Human Rights Law* (Edward Elgar 2014)

Further Resources

- 'Message to Mark the 75th Anniversary of the Universal Declaration of Human Rights, UN High Commissioner for Human Rights Volker Türk' <www.ohchr.org/en/human-rights-75> accessed 20 August 2023

§ § §

§ 21.1 RECURRING THEMES IN HUMAN RIGHTS DOCTRINE

MAX MILAS

BOX 21.1.1 Required Knowledge and Learning Objectives

Required knowledge: International Human Rights Law; Sources of International Law; Treaties; Interaction

Learning objectives: Understanding what the legal sources of international human rights law are; how international human rights operate; who reviews human rights violations and how.

BOX 21.1.2 Interactive Exercises

Access *interactive exercises for this chapter*[24] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

International human rights law (IHRL) now affects almost every corner, every living being, and every political entity on this planet. However, how IHRL *doctrinally* governs almost every phenomenon on this planet is the subject of this chapter. To this end, the chapter first introduces the positive legal sources of international human rights law before proceeding to present actors, obligations, dispute resolution mechanisms, and the structure of judicial review of IHRL.

24 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

B. SOURCES

I. TREATIES

Most contemporary international human rights are codified in treaties.[25] States have labelled human rights treaties with different names, ranging from charter and covenant to convention and protocol. However, this confusing labelling should not obscure the fact that international agreements for the protection of human rights, regardless of their name, constitute treaties under international law according to article 2(1)(a) VCLT[26] if they are concluded between at least two States and contain binding obligations.[27] The most emblematic human rights treaties due to their wide scope are the 1966 International Covenant on Civil and Political Rights[28] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[29] (ICESCR) at the universal level[30] and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[31] (ECHR),[32] the 1969 American Convention on Human Rights[33] (ACHR),[34] and the 1981 African Charter on Human and Peoples' Rights[35] (AfCHPR)[36] at the regional level. These general human rights treaties are supplemented by many specialised treaties for the protection of specific population groups, for example, women's rights[37] in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women[38] and prohibitions on discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination.[39]

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25 Sarah Chinkin, 'Sources' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 67; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd edn, OUP 2019) 33–34. On international treaties, see Fiskatoris and Svicevic, § 6.1, in this textbook.

26 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

27 Rhona KM Smith, *International Human Rights Law* (10th edn, OUP 2022) 1.

28 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

29 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR).

30 On the UN human rights system, see Ananthavinayagan and Baranowska, § 21.2, in this textbook.

31 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

32 On the European human rights system, see Theilen, § 21.4, in this textbook.

33 American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

34 On the Inter-American human rights system, see Kahl, Arévalo-Ramírez, and Rousset-Siri, § 21.5, in this textbook.

35 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (AfCHPR).

36 On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

37 On the role of women in international law, see Santos de Carvalho and Kahl, § 7.5, in this textbook.

38 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) (Convention of Belem do Para).

39 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

BOX 21.1.3 Advanced: Interpreting International Human Rights Treaties

In principle, the 'general rules on the interpretation of international treaty law' in articles 31–33 VCLT are also applicable to human rights treaties.[40] Human rights adjudicative bodies add a 'dynamic approach' to these general rules for interpreting international law. According to this, human rights treaties are 'living instruments' that have to be interpreted 'in light of present-day conditions'.[41] This progressive mode of interpretation is used to interpret human rights as 'proactively' and 'favourably' as possible for individuals.[42] However, this generally positive account of interpretive techniques should not obscure the fact that human rights treaties are also defined and applied deferentially. For example, in its case law on migration law, the ECtHR refers to the 'principle of state control' to leave States leeway in curtailing rights of refugees.[43] Similarly, the ECtHR uses the 'culpable conduct doctrine' to deprive migrants of human rights protections for failing to comply with procedures that exist only in law, not in fact.[44]

II. CUSTOM

Some human rights are also customary international law[45] and are therefore binding even for States that have not ratified a human rights treaty, provided sufficiently stable State practice and *opinio juris* (Latin: 'legal opinion') exist. Two developments indicate the required State practice and *opinio juris* for some customary human rights. First, many States recognise the legal principles of the Universal Declaration of Human Rights (UDHR)[46] as binding. Second, almost all States have now signed at least one human rights treaty.[47] To identify State practice and *opinio juris* for specific human rights, reference can be made in particular to the Universal Periodic Review of the Human Rights Council or judgments of the International Court of Justice (ICJ).[48]

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40 Kälin and Künzli (n 25) 34.

41 Kälin and Künzli (n 25) 34 referring to: *Tyrer v The United Kingdom* [1978] [31]; *Atala Riffo and Daughters v Chile* [2012] 83.

42 Matthias Herdegen, 'Interpretation in International Law' in *Max Planck Encyclopedia of Public International Law* (OUP 2009) [45–46].

43 Cabales Abdulaziz and Balkandali v. United Kingdom [1985] ECtHR Applications 9214/80, 9473/81 and 9474/81 [67–68]; Alan Desmond, 'The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?' (2018) 29 European Journal of International Law 261, 264.

44 *N.D. and N.T. v. Spain* [2020] ECtHR Applications 8675/15 and 8697/15 [200–231].

45 On customary law, see Stoica, § 6.2, in this textbook.

46 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

47 William A Schabas, *The Customary International Law of Human Rights* (OUP 2021) 342–343.

48 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ I.C.J. Reports 1951, p. 15 23; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 [99]; Schabas (n 48) 342–343.

Nowadays, at least the prohibition of torture, racial discrimination, and slavery are considered to be customary international law.[49]

III. GENERAL PRINCIPLES

General principles of international law[50] sometimes clarify the content of international human rights. For example, in the *Golder Case*, the European Court of Human Rights (ECtHR) held that the right to a fair trial incorporates the general principle that 'a civil claim must be capable of being submitted to a judge'.[51] Similarly, the Inter-American Court of Human Rights (IACtHR) applies general principles of international law in its case law.[52]

IV. *JUS COGENS* AND *ERGA OMNES*

The prohibition of torture, racial discrimination, and slavery are recognised not only as customary international law, but also as *jus cogens*[53] norms (Latin: 'peremptory norms').[54] Hence, all rules (whether in treaties, custom or principles) that contradict these *jus cogens* human rights are invalid.[55]

BOX 21.1.4 Advanced: International Human Rights and *Jus Cogens*

The status of *jus cogens* is reserved only for the most important human rights. A majority of human rights can be limited or suspended. However, in addition to the three recognised *jus cogens* human rights, there are other *jus cogens* human rights. For example, the IACtHR recognises protection against enforced disappearance[56] and the Inter-American Commission on Human Rights (IACmHR), the African Court on Human and Peoples' Rights (AfCmHPR), and the Human Rights Committee (CCPR) recognise the right to life[57] as *jus cogens* rights.[58]

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49 Chinkin (n 26) 71–72; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 618; Kälin and Künzli (n 25) 59–60.

50 On customary law, see Eggett, § 6.3, in this textbook.

51 *Golder v United Kingdom* [1975] ECtHR Application 4451/70 [35–36].

52 *Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations* [2020] IACtHR Advisory Opinion OC-26/20 [96, 100, 110].

53 On legal sources in general, see Eggett, § 6, in this textbook.

54 International Law Commission, 'Peremptory Norms of General International Law (jus cogens)' (2022) UN General Assembly, A/CN.4/L.967, Annex.

55 Chinkin (n 26) 73–74; Kälin and Künzli (n 25) 61–62.

56 IACtHR, 'García and Family Members v. Guatemala, Judgment' (2012) Series C No. 258 [96].

57 IACmHR, 'Victims of the Tugboat '13 de Marzo' v. Cuba' (1996) Case 11.436, Report 47/96 (Merits) [79]; AfCmHPR, 'General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (2015) [5]; CCPR, 'General Comment 29, Article 4: Derogations during a State of Emergency' (2001), CCPR/C/21/Rev.1/Add.11 [11].

58 Schabas (n 48) 62–67.

Ultimately, the list of human rights included among *jus cogens* norms remains ill-defined and is continuously evolving.[59]

Because all *jus cogens* norms are also *erga omnes*[60] (Latin: 'towards all') rules, violations of these three human rights can be invoked by all States before international tribunals.

BOX 21.1.5 Advanced: International Human Rights and *Erga Omnes*

Non–*jus cogens* norms can also be *erga omnes* rules. However, at least in 1970, the ICJ stated that 'on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality'.[61] Only if certain human rights can be considered 'rules concerning the basic rights of the human person'[62] can they give rise to obligations *erga omnes*.[63] This restrictive approach only applies to universal human rights treaties. In contrast, regional human rights treaties are based on the collective enforcement of human rights by all parties to the treaty.[64] States can, for example, bring cases against other States to human rights adjudicative bodies based on so-called State complaints.[65]

C. OBLIGATIONS

I. OBLIGATED ACTORS

According to the traditional understanding, human rights first and foremost bind the State[66] as the primary duty bearer.[67] In exercising its legislative, administrative, or judicial power, the State must comply with human rights obligations arising from treaties and customary law.[68] This also applies to acts of individual security officers,[69]

59 Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, CUP 2019) 85.

60 On legal sources in general, see Eggett, § 6, in this textbook.

61 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 [91].

62 CCPR, 'General Comment No 31 the Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) [2].

63 International Law Commission, 'Report of the International Law Commission' (2006) General Assembly, Official Records 61st session, Supplement No. 10 (A/61/10) 421–423.

64 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)* (n 22) [91].

65 Article 46 AfCHPR, article 45 ACHR, article 33 ECHR.

66 On States, see Green, § 7.1, in this textbook.

67 Article 1 ECHR, article 2(1) ICCPR, article 2(1) ICESCR, article 1(1) ACHR, article 1 AfCHPR.

68 Sarah Joseph and Sam Dipnall, 'Scope of Application' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 111; Kälin and Künzli (n 25) 69.

69 *Velásquez-Rodríguez v Honduras* [1988] [170].

private persons performing State functions,[70] or subsequent explicit acceptance of acts[71]. While States have wide discretion in implementing obligations under international law in general, human rights obligations are more specific: States must respect, protect, and fulfil human rights.[72]

Certainly, almost all human rights treaties oblige (only) States to respect human rights. However, non-State actors[73] may also have human rights obligations.[74] Some human rights treaties even contain clauses under which individuals have obligations. In this case, human rights obligations of private actors can be derived directly from the treaty text.[75]

BOX 21.1.6 Example: Obligations of Non-State Actors

Article 27(1) AfCHPR provides that 'Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community'.[76]

In addition, direct human rights obligations of non-State actors are discussed for a variety of cases if they threaten the human rights of individuals in a State-equivalent manner. This is discussed for terrorists,[77] insurgencies (when they exercise de facto State power in armed conflicts), and large corporations.[78]

II. PROTECTED ACTORS

Human rights bind the State vis-à-vis all individuals[79] within its territory and under its jurisdiction.[80] Unless human rights are not explicitly limited to nationals, they apply

70 Kälin and Künzli (n 25) 70–71.

71 *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] 3 [63 ff.].

72 Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 97; Schutter (n 61) 292.

73 On the variety of actors, see Engström, § 7, in this textbook.

74 While it is disputed whether these obligations of non-State actors can also be called 'obligations' or 'duties' or 'responsibilities', for the sake of consistency, the term 'obligations' is used in this chapter.

75 Kälin and Künzli (n 25) 73.

76 See also article 29(1) UDHR: 'Everyone has *duties* to the community in which alone the free and full development of his personality is possible'.

77 IACmHR, 'Report on Terrorism and Human Rights' (2002) OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. [48].

78 David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7 SUR – International Journal On Human Rights 198. Sir Nigel Rodley, 'Non-State Actors and Human Rights' in *Routledge Handbook of International Human Rights Law* (Routledge 2012); Kälin and Künzli (n 25) 72. On business and human rights, see González Hauck, § 7.7, in this textbook.

79 On individuals, see Theilen, § 7.4, in this textbook.

80 Joseph and Dipnall (n 68) 111; see also article 2(1) ICCPR.

equally to nationals and non-nationals.[81] Human rights protect vulnerable groups[82] in particular, such as undocumented migrants, disabled people, elderly people, and indigenous peoples as well as women, transgender people, and children.[83]

BOX 21.1.7 Example: Human Rights and Nationality

Article 25 ICCPR limits the right to political participation to citizens, while the prohibition of torture or inhuman and degrading treatment (article 7 ICCPR) applies equally to nationals and non-nationals (e.g. asylum seekers).

The unborn have no international human rights.[84] According to article 4(1) ACHR, life does not begin with birth, but already with conception. However, this clause has never been successfully invoked on behalf of an unborn and other regional and universal human rights treaties do not contain such a clause. On the contrary, both the ECtHR and the CCPR reject rights of the foetus independent of the pregnant person.[85] This approach is consistent with the wording of article 1 UDHR ('all human beings are *born* free'). Nowadays, many human rights systems provide a (sometimes limited) right to abortion.[86]

A uniform approach to human rights of corporations[87] does not exist. While in the European human rights system corporations have standing before the ECtHR, in the UN and Inter-American systems only individuals have human rights. However, insofar as rights of individuals are protected by a company, individuals can also invoke rights of companies.[88] For the rights of indigenous peoples,[89] on the other hand, most human rights systems provide for distinctive rights.[90]

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81 Ibid 111–112.

82 For a critical reflection on vulnerability in the human rights discourse, see Pamela Scully, 'Vulnerable Women: A Critical Reflection On Human Rights Discourse and Sexual Violence' (2009) 23 Emory International Law Review 113.

83 Article 2(2), (3) ICESCR; see also CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the Covenant)' (2000) E/C.12/2000/4; Roberto Andorno, 'Is Vulnerability the Foundation of Human Rights?' in Aniceto Masferrer and Emilio García-Sánchez (eds), *Human Dignity of the Vulnerable in the Age of Rights* (Vol 55, Springer International 2016).

84 Kälin and Künzli (n 25) 112.

85 *Vo v France* [2004] ECtHR Application 53924/00; *Peter Michael Queenan v Canada* [2005] CCPR CCPR/C/84/D/1379/2005.

86 Rebecca Smyth, 'Abortion in International Human Rights Law at a Crossroads: Some Thoughts on Beatriz v El Salvador' [2023] Völkerrechtsblog <https://voelkerrechtsblog.org/abortion-in-international-human-rights-law-at-a-crossroads/> accessed 21 June 2023; Spyridoula Katsoni, 'The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States' [2021] Völkerrechtsblog <https://voelkerrechtsblog.org/the-right-to-abortion-and-the-european-convention-on-human-rights/> accessed 21 June 2023.

87 On corporations, see González Hauck, § 7.7, in this textbook.

88 Joseph and Dipnall (n 68) 112–114.

89 On indigenous peoples, see Viswanath, § 7.2, in this textbook.

90 Article 1, 47 ICCPR; article 20(1) AfCHPR; *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* [2020] IACtHR Series C 400; *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v Guatemala* [2021] IACtHR Series C 440.

BOX 21.1.8 Example: Rights of Indigenous Peoples

Article 20(1) AfCHPR provides that 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen'.

III. TYPES OF OBLIGATIONS

Obligated actors must respect human rights by refraining from interference with rights (so-called negative obligations) and by protecting rights through action (so-called positive obligations).[91] Negative obligations require duty-bearers to refrain from unlawfully interfering with human rights. States may therefore only restrict human rights if they can provide a justification for the interference. This requires a restriction that is prescribed by law, serves a legitimate aim, and is necessary in a democratic society. Thereby, negative obligations correspond to the duty to respect human rights.[92]

BOX 21.1.9 Example: Negative Obligations

A State that uses judicial birching as a form of corporal punishment violates the prohibition of degrading punishment in article 7(1) ICCPR. Since this is a *jus cogens* obligation, the State cannot justify such an intrusion by referring to societal interests. In contrast, a COVID-19 related ban on public indoor assemblies interferes with the freedom of assembly under article 21 ICCPR but can be justified (at least during the initial spread of COVID-19) by reference to public health.

Duty-bearers cannot, however, fulfil their human rights obligations by mere omission. Instead, they must also respect their positive obligations. Positive obligations oblige duty-bearers to actively protect human rights. States must protect individuals from State, human, and natural threats (so-called duty to protect), provide effective access to justice (so-called procedural rights), share information, and enable participation in political and social processes.[93] These duties apply to all State organs and to economic, social, and cultural rights as well as civil and political rights.[94] Thereby, positive obligations correspond to the duties to protect and to fulfil human rights.

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91 Kälin and Künzli (n 25) 87.

92 This is discussed in more detail in: Mégret (n 70) 97; Schutter (n 61) 292.

93 Eckart Klein (ed), *The Duty to Protect and to Ensure Human Rights* (Berlin-Verl, Spitz 2000); Alastair Mowbray, 'Duties of Investigation Under the European Convention on Human Rights' (2002) 51 International and Comparative Law Quarterly 437; Kälin and Künzli (n 25) 87–89.

94 Ibid 106.

BOX 21.1.10 Example: Positive Obligations

If a State is aware, or should have been aware, that a landslide is imminent as a result of private coal mining and nevertheless fails to take legislative or executive measures to protect the population, the State violates the right to life in article 6(1) ICCPR of the victims. Similarly, impoverished persons are entitled to legal aid to enforce their legal claims.[95]

D. INTERNATIONAL REVIEW OF HUMAN RIGHTS OBLIGATIONS

In IHRL there is no global forum that monitors human rights as the final authority. Instead, State compliance with human rights is supervised simultaneously by universal and regional courts, committees, and commissions in judicial, quasi-judicial, and non-judicial forums.[96] Courts are authorised to exercise judicial review of human rights. In a similar way, quasi-judicial bodies can also rule on individual complaints. Non-judicial bodies operate alongside this (quasi-)judicial supervision by documenting and evaluating the general, not complaint-specific, human rights situation.[97]

I. JUDICIAL REVIEW

The most famous supervisors of human rights are certainly the three regional human rights courts in Europe, America, and Africa. The ECtHR, the IACtHR, and the AfCHPR have been influential in shaping human rights development not only in their regional human rights systems, but worldwide. In these forums, individuals can file cases against actions taken by the State (individual complaints) or States against other States (inter-State complaints). The ICJ also interprets human rights in its case law.[98]

BOX 21.1.11 Advanced: Standards of Review

Standards of review generally describe whether and to what extent a court adheres to the view of an institution or entity that was previously engaged in examining the facts and the law regarding a specific case.[99] In international law,

95 These examples are based on decisions mentioned in Kälin and Künzli (n 25) 97–98, 105.

96 Chinkin (n 26) 64.

97 'Courts & Monitoring Bodies' (*International Justice Resource Center*, 4 March 2014) <https://ijrcenter.org/courts-monitoring-bodies/> accessed 26 July 2022.

98 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] 639 [64–98].

99 Martha S Davis, 'A Basic Guide to Standards of Judicial Review' (1988) 33 South Dakota Law Review 469, 469–470; Amanda Peters, 'The Meaning, Measure, and Misuse of Standards of Review' (2009) 13 Lewis & Clark Law Review 233, 235.

standard of review is understood as the intensity with which an international adjudicative body[100] scrutinises the respondent State's own assessment of a factual situation and legal assessment of alleged violations of international law.[101]

International human rights adjudicative bodies do not take a uniform approach to standards of review. The ECtHR recognises a certain 'margin of appreciation' of States in the interpretation and implementation of human rights (legal margin) and in the assessment of the facts (factual margin).[102] However, the notion of standards of review should not be confused with the term 'margin of appreciation' mentioned in the case law of the European Court. The margin of appreciation presupposes a degree of deference and can therefore be better described as one deferential standard of review.[103] Although the IACmHR and the IACtHR referred to the margin of appreciation and thus to deferential review in some decision,[104] their settled case law rather suggests a review with less deference to States.[105] Similarly, the CCPR has mentioned the margin of appreciation in communications concerning questions of public morals[106] and national security,[107] but for the most part has rejected it,[108] even though the drafting history of the ICCPR contained an explicit endorsement of the margin of appreciation.[109] The CCPR justifies its strict standard of review considering State's voluntary accession to human rights treaties, the universalism of IHRL, and its own function and competence.[110] In the African human rights system, the AfCmHPR seems to assume a margin of appreciation on the part of member States,[111] whereas the AfCtHR is less deferential.[112]

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100 On dispute settlement in international law, see Choudhary, § 12, in this textbook.

101 Lukasz Gruszczynski and Wouter Werner (eds), 'Introduction' in *Deference in International Courts and Tribunals* (OUP 2014) 1–2; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (1st paperback edn, CUP 2018) 29–30.

102 Kälin and Künzli (n 25) 93–95; Mégret (n 74) 102–103.

103 L Gruszczynski and W Werner, 'Introduction' in L Gruszczynski and W Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014) 1 at 4.

104 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* [1984] IACtHR OC-4/84 [58, 62, 63]; *Ricardo Canese v Paraguay* [2004] IACtHR Series C 111 [97].

105 Antônio Augusto Cançado Trindade, *El Derecho Internacional de Los Derechos Humanos En El Siglo XXI* (2nd edn, actualizada, Editorial Jurídica de Chile 2006) 386–387; Gary Born, Danielle Morris and Stephanie Forrest, '"A Margin of Appreciation": Appreciating Its Irrelevance in International Law' (2020) 61 Harvard International Law Journal 70, 53; *Walter Humberto Vâsquez Vejarano v Peru* [2000] IACmHR Case 11.166 [24, 34].

106 *Leo Hertzberg et al v Finland* [1982] CCPR CCPR/C/OP/1 [10.3].

107 *Vjatseslav Borzov v Estonia* [2004] CCPR CCPR/C/81/D/1136/2002 [7.3].

108 *Länsman et al v Finland* [1992] CCPR CCPR/C/52D/511/1992 [9.4]; *General Comment No 29: Article 4: Derogations during a State of Emergency* [2001] CCPR Adopted at the Seventy-second Session of the Human Rights Committee [6]; CCPR, 'General Comment No 34 Article 19 Freedoms of Opinion and Expression' (2011) [36].

109 Report of the Third Committee, 'Draft International Covenants on Human Rights' (1963) UN Doc. A/5655 [49].

110 CCPR, 'General Comment No 34 Article 19 Freedoms of Opinion and Expression' (2011) [36].

111 Garreth Anver Prince v South Africa [2004] AfCmHPR Communication 255/02 [50–53].

112 *The Tanganyika Law Society and Legal and Human Rights Centre v United Republic of Tanzania* [2013] AfCtHPR Application 009/2011 [107–111, 112]; Adem Kassie Abebe, 'Right to Stand for Elections as an Independent Candidate in the African Human Rights System: The Death of the Margin of Appreciation

II. QUASI-JUDICIAL REVIEW

The quasi-judicial human rights commissions and committees complement the judicial supervision of human rights. On the one hand, these institutions are court-like when they decide on human rights violations in individual cases, as the IACmHR, the CCPR, and the Committee against Torture do. Thereby, they also contribute to the progressive development of their respective human rights treaties. On the other hand, unlike court decisions, the decisions of these adjudicative bodies are not binding. Moreover, the work of quasi-judicial institutions is not limited to individual or inter-State complaints. Instead, the commissions and committees also assess the general human rights situation in States in so-called State reports.[113]

III. NON-JUDICIAL REVIEW

In addition to the (quasi-)judicial review of human rights violations, politicised proceedings based on IHRL are also taking place. The most notorious forum is certainly the UN Human Rights Council (UNHRC). The non-judicial bodies are not concerned with developing a coherent interpretation of human rights, but with balancing political interests.[114] These mechanisms are often criticised for their politicisation and infectivity.[115] However, the key advantage of political review of human rights violations is its applicability to all States. Political review is neither spatially nor temporally limited, and can therefore also be applied to States that do not accept the jurisdiction of judicial and quasi-judicial adjudicative bodies.[116] Moreover, it is precisely the process of political negotiation that brings the human rights discourse into previously unattainable areas.[117] In addition to these institutionalised forms of human rights monitoring, there is also a vast field of non-governmental organisations, grassroots movements, and activist litigators that also participate in the interpretation and monitoring of human rights.[118]

E. (QUASI-)JUDICIAL REVIEW OF HUMAN RIGHTS VIOLATIONS

Human rights adjudicative bodies review human rights violations in individual and (more and more frequently lately[119]) inter-State complaints using a two-tiered structure.

Doctrine?' (*AfricLaw*, 19 August 2013) <https://africlaw.com/2013/08/19/right-to-stand-for-elections-as-an-independent-candidate-in-the-african-human-rights-system-the-death-of-the-margin-of-appreciation-doctrine-2/> accessed 29 June 2022.

113 Kälin and Künzli (n 25) 192–193.

114 Ibid 192.

115 Jane Connors, 'United Nations' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 385–386; Kälin and Künzli (n 25) 242–243.

116 Kälin and Künzli (n 25) 193.

117 Connors (n 119) 386–387; Kälin and Künzli (n 25) 243.

118 Chinkin (n 26) 78.

119 Isabella Risini, *The Inter-State Application under the European Convention on Human Rights: Between Collective Enforcement of Human Rights and International Dispute Settlement* (Brill Nijhoff 2018); Justine Batura and Isabella

In a first step, adjudicative bodies examine whether they have jurisdiction to hear the case, answer procedural preliminary questions, and usually review whether the complaint is manifestly ill-funded. In a second step, the adjudicative bodies examine the actual human rights violation using a two-step structure consisting of scope and interference as well as justification. This second step is the focal point of human rights complaints.

I. JURISDICTION AND ADMISSIBILITY

1. Jurisdiction

Adjudicative bodies can decide on a complaint only if they have jurisdiction.[120] Human rights treaties contain precise requirements for jurisdiction. In general, the person whose human rights have been violated must file a complaint (*ratione personae*; Latin: 'on the basis of the person') concerning the interpretation of human rights provided in the treaty under discussion (*ratione materiae*; Latin: 'on the basis of the matter'), provided that the facts of the case relate to the jurisdiction of the respondent State (*ratione loci*; Latin: 'on the basis of the place') and the human rights violation occurred after the respondent State became a party to the human rights treaty (*ratione temporis*; Latin: 'on the basis of the place').[121]

BOX 21.1.12 Advanced: Extraterritorial Application of International Human Rights

Human rights are applicable whenever the State has jurisdiction. The State has jurisdiction over its own territory.[122] However, States do not only act within their own territory, but also foreign territory to the detriment of human rights. For this case, the various human rights adjudicative bodies have found different approaches, which are discussed under the umbrella term of extraterritorial application. In the European system, the State has jurisdiction when it exercises effective control over a foreign territory or over the rights of an individual.[123] The African human rights system follows this approach.[124] The UN human rights system also echoes the effective control test but only requires that the individual be under the effective control of the State. The decisive factor is therefore the

Risini, 'Symposium: Inter-State Cases under the European Convention on Human Rights' (*Völkerrechtsblog*, 26 April 2021) <https://voelkerrechtsblog.org/on-current-developments-and-reform/>.

120 On jurisdiction of international courts, see Choudhary, § 12, in this textbook.

121 Article 32–34 ECHR, article 44–47 ACHR, and article 3–4 Protocol on the Establishment of an African Court on Human and Peoples' Rights.

122 Article 2(1) ICCPR.

123 *Al-Skeini and Others v the United Kingdom* [2011] ECtHR Application 56721/07 [131–150]; Joseph and Dipnall (n 68) 122.

124 AfCmHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (2015) [14].

relationship of the State to the person affected, not the relationship of the rights violation to the territory.[125]

BOX 21.1.13 Advanced: IHRL and International Humanitarian Law

Another common issue is whether the dispute concerns the interpretation of human rights or international humanitarian law (IHL).[126] While IHL regulates armed conflict, IHRL protect almost all human behaviour. However, human rights adjudicative bodies usually only have jurisdiction over international human rights violations and not on violations of IHL. Nevertheless, overlaps may occur between IHRL and IHL due to the substantive and territorial expansion of IHRL.[127] There are situations that are exclusively subject to IHL (e.g. requisitioning of property in occupied territory) or IHRL (e.g. violations of non-derogable rights) and situations in which both fields are applied concurrently.[128] In the case of parallel application of IHRL and IHL, the overlap between the fields must be resolved based on article 31(3)(c) VCLT. Thus, the provisions of both areas of law influence each other.[129] The concurrent application of IHR Land IHL is important due to the insufficient individual protection in armed conflict, as well as uncertainties in the applicability and lack of enforcement mechanisms of IHL.[130]

2. Admissibility

However, jurisdiction is not sufficient for the adjudicative bodies to decide the substance of the claim. Instead, complainants must have exhausted domestic remedies,[131] must observe certain time limits between the violation and the filing of the complaint,[132] and must not abuse their right to appeal.[133] In addition, anonymous complaints are not permitted.[134]

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125 CCPR, 'General Comment No 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (2004) [10]; Joseph and Dipnall (n 68) 125.

126 On the international humanitarian law, see Dienelt and Ullah, § 14, in this textbook.

127 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

128 Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018) 512–513.

129 *Hassan v the United Kingdom* [2014] ECtHR Application 29750/09 [104–105]; Sivakumaran (n 128) 515–516.

130 Sivakumaran (n 128) 507–511.

131 Article 35(1) ECHR, article 46(1)(a) ACHR, article 2 Optional Protocol to the ICCPR, and article 50 AfCHPR.

132 Article 35(1) ECHR, article 46(1)(b) ACHR, article 56(6) AfCHPR.

133 Article 35(3) ECHR, article 3 Optional Protocol to the ICCPR, article 56(3) AfCHPR.

134 Article 35(2) ECHR, article 3 Optional Protocol to the ICCPR. Nevertheless, the identity of the complainant may be kept secret in the proceedings if necessary.

3. Cursory Examination of Merits

Furthermore, the adjudicative body may dismiss a case as inadmissible if the complaint is manifestly ill-founded,[135] gives no indication of a significant violation,[136] or has already been addressed before the body or another international body.

II. MERITS

1. Scope and Interference

Human rights adjudicative bodies examine whether the State's conduct falls within the scope of a human right. Only when the State intrudes into a sphere protected by a human right does the question of justification arise. However, this question cannot be answered in the abstract, but only depending on the concrete human right. Each human right defines its own scope.[137]

2. Justifications

Human rights are not absolute but depend on other human rights and conflict with public interests. The conflict between two human rights or human rights and public interest can be resolved through limitations and derogations of human rights. However, certain rights cannot be restricted under any circumstances. This applies to all *jus cogens* human rights.[138]

BOX 21.1.14 Example: Conflicts of Human Rights

The freedom of the press of a tabloid allows reporting on the lives of celebrities (negative obligation). This reporting usually interferes with the personal rights of the celebrities (positive obligation). This overlap can be resolved by balancing both rights. On the other hand, a conflict between the (*jus cogens*) prohibition of torture on the one hand and the interest in uncovering a criminal act must always be decided in favour of the prohibition of torture.

a) Limitations

Human rights limitations must satisfy a three-step test. Although the specific requirements of the test depend on the human right in question, the basic structure of the test is similar among all human rights. First, the restriction must be prescribed by law. The law must be formulated in an accessible and sufficiently precise manner.[139] Second, the limitation must serve a legitimate aim.

135 Article 35(3) ECHR.
136 Article 12 Protocol 14 to the ECHR.
137 Kälin and Künzli (n 25) 118.
138 Mégret (n 74) 99.
139 Ibid 100–101.

BOX 21.1.15 Example: Legitimate Aims

Article 10 ECHR stipulates that limitations of the right to freedom of expression must serve 'the interests of national security'.

States usually meet the first two requirements. Therefore, the third requirement is decisive. The limitation must serve the purpose from the second step, there must be no less intrusive means, and the means must be proportionate, that is the interest in human rights protection must not outweigh the interest in the limitation.[140] An interference is proportionate if the interest of the individual in exercising their human right does not outweigh the interest of the State in protecting the public interest.[141]

b) Derogations

In emergencies, States in the European, American, Arabic, and universal human rights systems can not only restrict human rights, but also derogate from them. Derogations are permitted if a state of emergency is declared and exists, the emergency measure is necessary and non-discriminatory, and provided that no non-derogable rights are violated.[142] The AfCHPR does not contain a derogation clause. Therefore, even in states of emergency, the parties to the AfCHPR can justify infringements on human rights only by relying on the general limitation clause.[143]

c) Economic, Social, and Cultural Rights

Economic, social, and cultural rights (ESC rights) do not oblige the State to refrain from doing something (non-interference with human rights), but to do something (providing resources). Therefore, the test for justifying interferences with these rights differs from other rights. Article 2 ICESCR contains the two decisive State obligations for ESC rights: progressive realisation and the prohibition of discrimination.[144] According to the requirement of progressive realisation, States are obliged to implement incrementally those rights for which they have sufficient resources.[145] The prohibition of discrimination furthermore requires States to guarantee all rights without discrimination.[146] The regional human rights systems further stipulate these State obligations.

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140 Kälin and Künzli (n 25) 92–93; Mégret (n 74) 101.

141 Ibid 93; for an introductory discussion of the problems during this balancing, see Schutter (n 61) 388–390.

142 Article 4 ICCPR, article 15 ECHR, and article 27 ACHR.

143 *Commission Nationale des Droits de l'Homme et des Libertes v Chad* [1992] AfCmHPR Communication 74/92 [21].

144 Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 133–134.

145 Ibid 143, 151–152.

146 Ibid 174–175.

F. CONCLUSION

This chapter has shown that IHRL derives from multiple sources of law, binds and obligates different actors in international law, various mechanisms exist to review human rights, and international courts around the world apply a similar scheme to review human rights violations. However, the information presented in this chapter can only serve as an introduction to a thorough discussion of IHRL. The following chapters show how different universal and regional systems regulate human rights standards by adapting them to global or local specificities.

BOX 21.1.16 Further Readings and Further Resources

Further Readings

- S Chinkin, 'Sources' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018)
- S Joseph and S Dipnall, 'Scope of Application' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018)
- F Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2018)
- O de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn, CUP 2019)

Further Resources

- University of Pretoria Centre for Human Rights, 'Africa Rights Talk' <www.chr.up.ac.za/africa-rights-talk> accessed 17 July 2023
- D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005)
- R Perkins, 'Mabo' (*ABC iView*, 2012) <https://www.youtube.com/watch?v=MwChtmA1Qr4> accessed 7 December 2023

§§§

§ 21.2 UNITED NATIONS HUMAN RIGHTS SYSTEM

THAMIL VENTHAN ANATHAVINAYAGAN
AND GRAŻYNA BARANOWSKA

BOX 21.2.1 Required Knowledge and Learning Objectives

Required knowledge: History of International Law; Sources of International Law; International Organisations

Learning objectives: Understanding the relevance of the United Nations human rights system and meaning of the Universal Declaration of Human Rights; the United Nations treaty- and charter-based system; and the United Nations treaty bodies and their functions.

BOX 21.2.2 Interactive Exercises

Access *interactive exercises for this chapter*[147] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

The UN human rights system differs from the regional human rights systems in its universality. The Universal Declaration of Human Rights (UDHR)[148] adopted in 1948 was crucial in triggering the codification of human rights, which on the UN level led to the creation of the core international human rights treaties and their monitoring bodies.

147 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.
148 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

B. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UDHR is hailed as the first document of global reach that encompassed a wide range of human rights, touching upon civil and political rights on the one hand and, on the other hand, also economic and social rights. It also set the stage for various other human rights documents to follow, such as the twin human rights covenants, the International Covenant on Civil and Political Rights (ICCPR)[149] and the International Covenant on Economic and Social Rights (ICESCR).[150] While the UDHR is a non-binding document, some of its provisions have passed into customary international law.[151]

In face of the destruction caused by the Second World War – and to this end with the failure of the League of Nations – the world leaders of the post-war world assembled in New York to create the United Nations,[152] an assembly of States to prevent the outbreak of the Third World War. At the same time, the UDHR was drafted by persons from different cultural backgrounds, such as Charles Malik, Carlos P. Romulo, Peng-chun Chang, and Eleanor Roosevelt. It cannot be denied, however, that the UDHR has European origins.[153] Despite its rather elitist and hegemonic origins, the UDHR triggered a larger discussion and codification of human rights in different parts of the world, especially in the Global South amid its decolonisation period.[154]

The United Nations General Assembly has given the Office of the High Commissioner for Human Rights (OHCHR) the responsibility of promoting and defending the enjoyment and complete realisation of all human rights by all people. To that end, the OHCHR is mandated by the United Nations General Assembly with its resolution 48/141 to promote human rights internationally and domestically.

C. TREATY BODIES AND CORE INTERNATIONAL HUMAN RIGHTS TREATIES

The aforementioned UDHR triggered the creation of the prime human rights treaties, namely the ICESCR and the ICCPR. While the work initially was supposed to lead to

149 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

150 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR). Magdalena Sepulveda, and others (eds), *Human Rights Reference Handbook* (3rd edn, University for Peace 2004) 77–113.

151 On customary law, see Stoica, § 6.2, in this textbook.

152 On the United Nations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

153 Susan Waltz, 'Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights' (2002) 23 Third World Quarterly 437.

154 Johannes von Aggelen, 'The Preamble of the United Nations Declaration of Human Rights' (2000) 129 Denver Journal of International Law and Policy 129. On decolonisation, see González Hauck, § 1, in this textbook.

one general treaty on human rights, the different perspective on political and economic rights led to the adoption of two treaties, each called a 'Covenant': one on civil and political rights and the other on economic, social and cultural rights. The remaining core human rights treaties are called 'Conventions'. While the negotiations to adopt the two covenants were ongoing, States within the UN decided to work on a specialised treaty on racial discrimination, which was adopted in 1965, a year before the two covenants.[155] Since then, specialised conventions on discrimination against women, torture, rights of the child, migrant workers, persons with disabilities, and enforced disappearances have been adopted.

The UN treaty-based human rights system is based on nine core international human rights treaties (and associated optional protocols). Each of those treaties is monitored by a committee, called a treaty body. Besides the nine committees set up to monitor the core treaties, an additional treaty body was created with a preventive mandate: the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Subcommittee differs slightly from the other treaty bodies, as it created a two-pillar system of monitoring places of detention. Consequently, there are currently ten UN treaty bodies:

- International Convention on the Elimination of All Forms of Racial Discrimination[156] (1969): Committee on the Elimination of Racial Discrimination (CERD)
- International Covenant on Economic, Social and Cultural Rights (1976): Committee on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights (1976): Human Rights Committee (CCPR)
- Convention on the Elimination of All Forms of Discrimination against Women[157] (1981): Committee on the Elimination of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[158] (1987) Committee against Torture
- Convention on the Rights of the Child[159] (1990) Committee on the Rights of the Child International
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[160] (2003) Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

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155 David Keane, 'Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument' (2020) 20 Human Rights Law Review 236.

156 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

157 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1982) 1249 UNTS 13 (CEDAW).

158 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

159 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

160 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3.

- Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[161] (2006): Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)
- Convention on the Rights of Persons with Disabilities[162] (2008): Committee on the Rights of Persons with Disabilities International
- Convention for the Protection of All Persons from Enforced Disappearance[163] (2010): Committee on Enforced Disappearances (CED).

I. MEMBERS

The members of treaty bodies are independent human rights experts, who are nominated and elected by the respective State parties to the covenants. The exception is the Committee on Economic, Social and Cultural Rights, whose members are elected by the Economic and Social Council (ECOSOC). While treaty body members should be elected with the aim to ensure diversity, this has not been achieved yet, with regard to neither gender nor geographic representation.[164] They serve in their personal capacity and are expected to carry out their duties impartially (see also Addis Ababa Guidelines[165]). The UN does not pay the treaty bodies members; they do receive an allowance for the sessions, which usually take place twice a year in Geneva.

II. COMPETENCES

1. Periodic Reports

States that have ratified a treaty are obliged to submit regularly reports to the relevant committee. Those reports are usually submitted every four years. The treaty bodies analyse the State report, considering also information submitted by non-governmental organisations and national human rights institutions. Afterwards, they discuss with State representatives each State report and adopt a non-binding document called 'concluding observations', which contains recommendations to the relevant State party.

2. Individual Communications

Treaty bodies also have the competence to review individual and inter-State communications. This competence requires an additional approval of a State – either

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161 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237 (OPCAT).

162 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2525 UNTS 3.

163 Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

164 'Diversity in Membership of the UN Human Rights Treaty Bodies' (*Geneva Academy*, February 2018) <Diversity in Treaty Bodies Membership.pdf (geneva-academy.ch)> accessed 18 July 2023.

165 OHCHR, 'Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies' <https://www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/AddisAbebaGuidelines_en.doc> accessed 11 December 2023.

through the ratification of an Additional Protocol (for example the CCPR) or through a declaration by the State to the relevant treaty body (see for example the declarations to the CEDAW). Communications can concern only those States that have accepted the communication procedure. Currently, eight of the treaty bodies have the competence to review individual communications. Communications are reviewed by the treaty bodies, both regarding their admissibility and substance. After reviewing the case, the committees issue non-binding 'views', in which they state whether the provisions of the relevant treaty have been violated. Finally, the treaty bodies monitor whether and how States implement the views.

3. Inter-State Communications

Seven of the treaty bodies allow State parties to raise alleged violations of the treaty by another treaty body. Inter-State procedures at treaty bodies are extremely rare. So far, the CERD reviewed has *Qatar v the Kingdom of Saudi Arabia*[166] and *Qatar v the United Arab Emirates*,[167] which were suspended, as well as *State of Palestine v Israel*.[168]

4. Adopting General Comments

All treaty bodies adopt general comments, which explain how the respective treaty bodies interpret a treaty provision, thematic issues, or methods of work. Some treaties provide for this competence within the treaty (e.g. article 21 of the Convention on the Elimination of All Forms of Discrimination against Women).

5. Other Competences

Treaty bodies also have other competences that are specific to their mandate. For example, the CED's urgent action procedure is a request from the committee to the State to immediately take all necessary measures to search for, locate, and protect a disappeared person and investigate the disappearance. Another example is the SPT establishes a system of regular visits by independent national and international bodies to places where people are deprived their liberty.

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166 Decision on the jurisdiction of the Committee in respect of the inter-State communication submitted by Qatar against Saudi Arabia, CERD-C-99–5, 19 October 2020; Decision of the ad hoc Conciliation Commission on the termination of the proceedings concerning the interstate communication Qatar v. the Kingdom of Saudi Arabia, <www.ohchr.org/sites/default/files/documents/hrbodies/cerd/decisions/2022-12-02/AHCC-CERD-Qatar-v-KSA-DECISION-TERMINATION.pdf> accessed 18 July 2023.

167 Decision on the jurisdiction of the Committee in respect of the inter-State communication submitted by Qatar against the United Arab Emirates, CERD/C/99/3, 18 June 2020; Decision of the ad hoc Conciliation Commission on the termination of the proceedings concerning the interstate communication Qatar v. the United Arab Emirates, <www.ohchr.org/sites/default/files/documents/hrbodies/cerd/decisions/ahcc-cerd-qatar-v-uae-decision-termination-adopted-26-01-2023.doc> accessed 18 July 2023.

168 Inter-State communication submitted by the State of Palestine against Israel: decision on admissibility, 17 June 2021, CERD/C/103/4; Complete list of Documents concerning the case State of Palestine v. Israel: <tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=187> accessed 18 July 2023.

D. CHARTER-BASED SYSTEM

The UN human rights machinery, in addition to the treaty-based strand of human rights protection and promotion, has a charter-based strand. At the beginning of the UN, this consisted of the United Nations Human Rights Commission, replaced by its successor, the United Nations Human Rights Council (UNHRC). The reason for this development and replacement was the perception of the United Nations Human Rights Commission as being increasingly politicised. Throughout the 1990s and the 2000s, debate arose about the human rights records of a few commission members who were widely viewed as persistent human rights violators. The credibility of the commission was seriously impacted by these incidents.[169]

The UNHRC was created on 15 March 2006 by the UN General Assembly 'to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights' according to United Nations General Assembly Resolution 60/251.[170] The UNHRC has different mechanisms to ensure the promotion and protection of human rights: the Universal Periodic Review, the Special Procedures, the Advisory Committee and the Complaint Procedure. Up to now, the UNHRC proved to be a body of universal relevance.

E. UN SYSTEM AND REGIONAL SYSTEMS

In 1993, the Commission on Human Rights adopted several resolutions that encouraged the United Nations Secretary General to strengthen cooperation and knowledge exchange with international and regional human rights bodies, while inviting the treaty bodies to explore ways to increase the exchange of information and cooperation with regional human rights mechanisms. To this end, the Resolution 1993/51 states that the Secretary-General is requested to continue fostering exchanges between the UN and regional intergovernmental organisations that deal with human rights.

F. CONCLUSION

The emergence of an international human rights infrastructure was crucial to address human rights violations at a global scale. Human rights became a dominant force for the liberation of Third World peoples. As Antony Anghie writes:

> The international human rights law that emerged as a central and revolutionary part of the United Nations period offered one mechanism by which Third

169 Congressional Research Service, 'The United Nations Human Rights Council: Background and Policy Issues' (26 January 2022) <https://sgp.fas.org/crs/row/RL33608.pdf> accessed 1 August 2023.

170 UNGA Res 60/251. Human Rights Council (3 April 2006), 60th session (A/RES/60/251).

> World peoples could seek protection, through international law, from the depredations of the sometimes pathological Third World state. It was for this reason that international human rights law held a special appeal for Third World scholars.[171]

The ability of State parties to fulfil their responsibilities, the effectiveness of the treaty and charter bodies, and eventually the access to the system by rights holders – the system's true beneficiaries – are in a constant flux of development. More than ever, it is obvious that strengthening depends on choices being made by States parties, treaty bodies, and the Office of the High Commissioner within the bounds of their respective powers and in cooperation with one another. All must contribute in order for the system to work correctly. This specifically implies that individuals must make highly critical judgments. The United Nations has established a worldwide framework for the promotion and protection of human rights, generally in accordance with its Charter, legally enforceable treaties, and other initiatives aimed at promoting democracy and human rights globally. However, the human rights system still has a long way to go in a rapidly changing world.

BOX 21.2.3 Further Readings and Further Resources

Further Readings

- P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP 2000)
- TV Ananthavinayagan, 'Uniting the Nations or Dividing and Conquering? The United Nations' Multilateralism Questioned – A Third World Scholar's Perspective' (2018) 29 Irish Studies in International Affairs 35
- AS Bradley, 'Human Rights Racism' (2019) 32 Harvard Human Rights Journal 1
- MW Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law 589.
- S Waltz, 'Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights' (2002) 23 Third World Quarterly 437

Further Resources

- Congressional Research Service, 'The United Nations Human Rights Council: Background and Policy Issues' <https://sgp.fas.org/crs/row/RL33608.pdf> accessed 26 April 2022

171 Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 Third World Quarterly 739.

- UN Treaty Body Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 26 July 2023
- OHCHR Jurisprudence Database <https://juris.ohchr.org> accessed 26 July 2023
- UN Human Rights Bodies Database <https://ap.ohchr.org/Documents/gmainec.aspx> accessed 26 July 2023

§ § §

§ 21.3 AFRICAN HUMAN RIGHTS SYSTEM

ADAMANTIA RACHOVITSA

BOX 21.3.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Individuals; Recurring Themes in Human Rights Doctrine

Learning objectives: Understanding the basic substantive and institutional features of the African human rights system.

BOX 21.3.2 Interactive Exercises

Access *interactive exercises for this chapter*[172] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

Although human rights were part of the agenda of the Pan-African Congress in the anti-colonial struggle prior to the independence of the African States, the Organisation of African Unity (OAU), established in 1963, made no reference to human rights. Instead, it emphasised decolonisation, State sovereignty, and development. The language of human rights was (re)introduced with the negotiations for the African Charter on Human and Peoples' Rights (ACHPR or Banjul Charter),[173] adopted in 1981.[174] Subsequently, the Constitutive Act of the African Union (AU), which succeeded

172 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/

173 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

174 For discussion on the Third World approaches in international law, see Hauck, § 3.2, in this textbook. For critique on human rights and discussion of human rights as a colonial construction, see Ananthavinayagan and Theilen, § 21.8, in this textbook.

the OAU in 2002, placed human rights values among the AU's own objectives and principles (see article 3(h) and article 4(m), respectively).[175]

This section first explains the substantive guarantees of human and peoples' rights in Africa by way of selectively highlighting certain aspects of the African Charter on Human and Peoples' Rights and other treaties adopted under the auspices of the OAU/AU. Second, the discussion focuses on the protective mechanisms available in the African human rights system, including the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights as well as the human rights–protective mandate of certain sub-regional African courts.

B. THE SUBSTANTIVE GUARANTEES OF HUMAN AND PEOPLES' RIGHTS

I. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The ACHPR is not only the lighthouse of the African system of human and peoples' rights protection (with 54 State parties), but also a human rights treaty with many features that distinguish it from other regional human rights systems. The ACHPR is the only regional human rights treaty that accords equal weight to the different generations of human rights. The text provides for most civil and political rights and a few economic, social, and cultural rights, such as the right to work, the right to health, and the right to education, as well as peoples' rights (also known as solidarity rights). Peoples' rights hold a prominent place and include the right to self-determination,[176] the right to dispose freely of natural resources, the right to development, and the right to a healthy environment (articles 20–24).[177] Another unique characteristic of the ACHPR is its emphasis on the duties of the individual towards the community and the State (articles 27–29).[178] An example of such a duty is the duty of the individual to preserve and strengthen positive African values (article 29(7)). Finally, in contrast to other human rights instruments, the ACHPR does not contain a derogation clause, which means that limitation on ACHPR rights cannot be justified by emergencies.[179]

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175 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (OUP 2020) 280–281.

176 On self-determination, see Bak McKenna, § 2.4, in this textbook.

177 For the groundbreaking reparations' judgment of the ACtHPR on the recognition of the Ogiek community as a holder of rights collectively and the legal implications of the notion of collective harm when deciding moral prejudice and non-pecuniary reparations, see The African Commission on Human and Peoples' Rights vs Republic of Kenya Application No 006/2012 (ACtHPR, 23 June 2022) paras 44, 92–93, 113–114, 116, 160(iv).

178 For the presence of duties of individuals in Islamic and Arab documents on human rights, see Rachovitsa, § 21.6, in this textbook.

179 Abdi J Ali, 'Derogation from Constitutional Rights and Its Implication under the African Charter on Human and Peoples' Rights' (2013) 17 Law, Democracy & Development 78; Mohamed N Bhuian, 'African (Banjul) Charter: A Unique Step to Protect Human Rights in Africa' (2001) 5 Bangladesh Journal of Law 35.

At the same time, the ACHPR features certain notable shortcomings most of which have been addressed by the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court on Human and Peoples' Rights (ACtHPR). First, the text omits certain rights (e.g. the right to privacy).[180] Second, the ACHPR is less detailed (compared to other human rights treaties) in setting out essential safeguards with regard to, for instance, the right to a fair trial. The ACtHPR's case law has incorporated the guarantees of the right to a fair trial under international human rights law into the protective scope of article 7.[181] Third, the ACHPR is silent on the requirements for a restriction on a human right to be lawful. Article 27(2) ACHPR provides only that 'the rights and principles of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest' without referring to the principles of legality and proportionality. In response to this, the ACtHPR pronounced, in its very first judgment on the merits in 2013, that the restrictions imposed on human rights must conform to the three-part test under international human rights law: restrictions must be prescribed by law, serve a legitimate aim, and be proportionate to the aim pursued.[182] Fourth, the ACtHPR, by affirming the ACmHPR's practice,[183] 'neutralised' the so-called claw-back clauses contained in the ACHPR. A claw-back clause subjects the exercise of a right provided under an international treaty on human rights to domestic law. The ACHPR subjects the exercise of many rights, such as the right to freedom of expression or the right to political participation, to domestic law. For example, article 9(2) ACHPR reads: 'every individual shall have the right to express and disseminate opinions *within the law*' (emphasis added). In contrast, most human rights treaties do not contain such clauses.[184] The ACtHPR ruled that domestic law ought to be in correspondence with international standards and should not nullify the scope and essence of the rights it regulates.[185] This ruling has also been confirmed by the ICJ in the *Diallo* case.[186]

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180 Certain rights omitted from the text of the ACHPR, including the right to privacy, could be read into the right to human dignity, as provided under article 5 ACHPR.

181 For example, Alex Thomas v United Republic of Tanzania Application No 005/2013 (ACtHPR, 20 November 2015) para 124.

182 Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania Application No 009/2011 (ACtHPR, 14 June 2013) para 106.

183 Media Rights Agenda and Constitutional Rights Project v Nigeria Application No 224/1998 (ACmHPR, 2000) paras 65–70.

184 Adamantia Rachovitsa, 'The African Court on Human and Peoples' Rights: A Uniquely Equipped Testbed for (the Limits of) Human Rights Integration?' in Emmanuelle Bribosia, Isabelle Rorive, and Ana Maria Correa (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (Intersentia 2018) 69.

185 Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania Application No 009/2011 (ACtHPR, 14 June 2013) paras 108–109.

186 The International Court of Justice in *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, para 65 while discussing article 12(4) of the ACHPR and article 13 of the ICCPR, clarified that when a human rights provision requires national authorities to make a decision in accordance with the law, acting in accordance with domestic law is a necessary but not sufficient condition for complying with international law. The applicable domestic law must be compatible with the other requirements of a given human rights treaty.

II. OTHER HUMAN RIGHTS AND PEOPLES' TREATIES

In addition to the ACHPR, the African system of human and peoples' rights includes other treaties adopted under the auspices of the OAU/AU, such as

- The 1969 Convention regarding the Specific Aspects of Refugee Problems in Africa
- 1990 African Charter on the Rights and Welfare of the Child
- The 2007 African Charter on Democracy, Elections and Governance
- The 2009 Convention for the Protection and Assistance of Internally Displaced Persons in Africa
- The 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- The 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older People in Africa.

C. PROTECTIVE MECHANISMS

I. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The ACmHPR is an autonomous treaty body entrusted with the mandate of promoting and protecting human and peoples' rights in Africa. Its views and findings are non-binding but carry strong persuasive authority and have contributed to the progressive development of States' obligations under the ACHPR.

1. State Reporting

Parties to the ACHPR have the obligation to report on progress and challenges concerning its implementation every two years. Non-governmental organisations[187] (NGOs) are allowed to submit non-expert reports. The ACmHPR, in its early practice, did not publish the reports submitted by States and did not adopt concluding observations. Subsequently, it changed its approach in the interest of transparency. From 2001, the ACmHPR began adopting concluding observations and publishing State reports and its own observations on its website.[188] However, many States have never submitted a report or tend to be very late in doing so.

2. Inter-State Communications

A State party may bring a complaint concerning an alleged violation of the ACHPR against another party before the ACmHPR. This procedure has been used only once. In 2003, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*,[189]

187 On NGOs, see Chi, § 7.6, in this textbook.

188 ACmHPR <https://achpr.au.int/statereportsandconcludingobservations> accessed 20 August 2021.

189 Democratic Republic of Congo v. Burundi, Rwanda and Uganda Application No 227/99 (ACmHPR, May 2003).

the ACmHPR held that the armed forces of the respondent States committed multiple violations of the ACHPR during their occupation of the eastern province of the Congo.

3. Communications Submitted by Individuals and NGOs

The ACHPR provides that communications other than those of State parties may be submitted to the ACmHPR. Although the text does not clarify who may bring these communications, the ACmHPR accepts that individuals and NGOs may do so. According to article 56 ACHPR, a communication needs to meet certain requirements to be admissible. The author of the communication does not have to be the victim of the alleged violation. This is significant since victims may lack access to resources or awareness of their rights and available remedies, or they may be hesitant, perhaps even afraid, to submit complaints themselves. NGOs regularly make use of this broad standing, bringing many communications before the ACmHPR, which testifies to their prominent role in the ACmHPR's activities. The ACmHPR has adopted many foundational views.[190]

4. Other Functions of the ACmHPR

In fulfilling its mandate, the ACmHPR also exercises a number of other functions, including:

- Creating special mechanisms, such as special rapporteurs, committees, and working groups[191]
- Publishing general comments, guidelines, or declarations with a view to progressively developing the African human rights law
- Carrying out on-site visits, promotional or protective missions, and investigative measures on the territory of States, where appropriate.

II. THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

The Arusha-based ACtHPR may be the youngest court among its regional counterparts, but its jurisdiction and case law not only present unique features but also offer valuable lessons to be studied. The ACtHPR's mandate is provided for in the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol),[192] which entered into force in 2003, and in its Rules of Procedure. As far the relationship between the ACtHPR and the ACmHPR is concerned, they are independent and the former

190 For example, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria Application No 155/96 (ACmHPR, 2001).

191 For discussion, see, Christopher Heyns and Magnus Killander, 'Africa' in D Moeckli, Sangheeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2018) 474–475.

192 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998; entered into force 25 January 2004).

complements the protective mandate of the latter.[193] In addition, the ACmHPR may submit cases to the ACtHPR.[194]

In 2004, the AU Assembly of Heads of State and Government decided that the African Court on Human and Peoples' Rights should be integrated into one court with the Court of Justice of the AU, referencing financial and logistical constraints. In 2008 and 2014, the Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights were adopted respectively, merging the two courts into a single new court, named the African Court of Justice and Human Rights. Neither protocol is yet in force and, consequently, the African Court on Human and Peoples' Rights is still in operation.

1. The Jurisdiction of the ACtHPR

The ACtHPR's jurisdiction may be divided into advisory and contentious. As far as its advisory jurisdiction is concerned, the ACtHPR may, at the request of an AU member State, any AU organ or any African organisation recognised by the AU, provide an opinion on any legal matter relating to the ACHPR or any other relevant human rights instrument. The ACtHPR has rendered 15 Advisory Opinions thus far. Turning to its contentious jurisdiction, under article 3(1) of the Protocol, the ACtHPR has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the ACHPR, the Protocol and any other relevant human rights instrument ratified by the States concerned. Thirty-four State parties to the ACHPR have currently ratified the Protocol.[195]

The Court may receive applications from the ACmHPR, State parties to the Protocol, or African intergovernmental organisations (article 5(1) of the Protocol). Individuals and NGOs do not have direct access to the ACtHPR unless the State against which the application is submitted has deposited the declaration described in article 34(6) of the Protocol, accepting the ACtHPR's competence to decide such complaints. In the absence of such a declaration, a complaint can be only submitted to the ACmHPR, which may decide to refer the communication to the ACtHPR. As of June 2023, only eight States have accepted the competence of the ACtHPR to decide complaints brought by individuals and NGOs (Burkina Faso, The Gambia, Ghana, Guinea Bissau, Mali, Malawi, Niger, and Tunisia). Since 2016, Benin, Rwanda, Côte d'Ivoire and even Tanzania – the ACtHPR's host State – withdrew their declarations, marking an unfortunate landmark in the ACtHPR's history.[196] However, in November 2021, the

193 Ibid, article 2.

194 Ibid, article 5.

195 AfCtHPR, 'List of Ratifications' <www.african-court.org/wpafc/wp-content/uploads/2023/03/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf> accessed 20 August 2023.

196 Nicole de Silva and Misha Plagis, 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court' (*Opinio Juris*, 19 May 2020) <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-

Republic of Guinea Bissau and the Republic of Niger deposited respective declarations under article 34(6) of the Protocol allowing direct access to the ACtHPR.[197]

Pursuant to articles 3(1) and 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, the ACtHPR enjoys a unique material jurisdiction. Its mandate extends to the interpretation and application of not only the ACHPR but also any other relevant human rights instrument ratified by the States concerned. In contrast, the material jurisdiction of UN human rights bodies and of other regional human rights courts is limited to matters concerning only their respective constitutive instruments.[198]

The future African Court of Justice and Human Rights is expected to have a different structure and a considerably broader material jurisdiction. More specifically, it will have three separate sections: a general affairs section, a human and peoples' rights section and an international criminal law section. The AU decided to add individual and corporate criminal responsibility to the jurisdiction of the merged court. This comes as a response to the strong dissatisfaction among many African States about the International Criminal Court's (perceived) biased focus on Africa.[199]

2. The ACtHPR's Case Law

Overall, the ACtHPR has an unfolding case law ordering provisional measures and ruling on matters pertaining to jurisdiction, admissibility, merits, and reparations. The subject matter of the cases spans, for instance:

- The right to political participation in connection to the prohibition of independent candidature[200] or the arbitrary revocation of one's passport[201]
- The right to freedom of expression and whether criminal defamation statutes are proportionate and necessary restrictions[202]
- Several aspects of the right to a fair trial[203]
- Indigenous peoples and collective rights.[204]

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states-increasing-resistance-to-africas-human-rights-court/#:~:text=To%20date%2C%20no%20state%20has,African%2C%20continental%20human%20rights%20court.> accessed 20 August 2023.

197 Press Release (*ACtHPR*, 3 November 2021) <www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> accessed 20 August 2023.

198 Adamantia Rachovitsa, 'On New "Judicial Animals": The Curious Case of an African Court with Material Jurisdiction of a Global Scope' (2020) 19 Human Rights Law Review 255.

199 Geoff Dancy and others, 'What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya' (2020) 64 Journal of Conflict Resolution 1443.

200 Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania Application No 009/2011 (ACtHPR, 14 June 2013).

201 Kennedy Gihana and Others v Rwanda Application No 017/2015 (ACtHPR, 28 November 2019).

202 Lohe Issa Konate v Burkina Faso Application No 004/2013 (ACtHPR, 5 December 2014).

203 Mohamed Abubakari v United Republic of Tanzania Application No 007/2013 (ACtHPR, 3 June 2016).

204 African Commission on Human and Peoples' Rights v Republic of Kenya Application No 006/2012 (ACtHPR, 23 June 2018).

State parties are under the obligation to comply with the ACtHPR's judgments. The AU Executive Council monitors the execution of judgments on behalf of the Assembly. The reality on the ground is that the level of compliance with the decisions is poor: of the over 200 decisions and judgments rendered by the ACtHPR, less than 10% have been fully complied with, 18% partially implemented, and 75% not implemented at all.[205] Certain alternative measures to ensure better implementation of the judgments are under discussion, including the introduction of a monitoring role for the ACtHPR, under a newly established Monitoring Unit, or the possibility for the ACtHPR to issue compliance judgments.

III. SUB-REGIONAL COURTS PROTECTING HUMAN AND PEOPLES' RIGHTS

Individuals and NGOs regularly resort to sub-regional African courts, established in the context of regional economic communities, to raise and litigate human rights claims.

The most active in the field of human rights is the Economic Community of West African States (ECOWAS). The ECOWAS Community Court of Justice can hear complaints on human rights violations and applies the ACHPR as its standard of assessment.[206] The fact that it grants direct access to individuals, without requiring them to have exhausted domestic remedies, offers a notable litigation advantage for applicants.

The East African Court of Justice does not have explicit jurisdiction to address human rights complaints but nonetheless deals with such complaints as long as they are considered to be violations falling within the scope of the East African Community treaty.[207]

The Tribunal of the Southern African Development Community (SADC) followed the approach of the East African Court of Justice, namely, to address human rights claims without a clear mandate to do so.[208] However, this choice was more politically controversial than expected and it seriously backfired. After several judgment rulings against Zimbabwe and its refusal to comply, the Tribunal was de facto suspended in 2010.[209] In 2014, the SADC adopted a new protocol that will confine the Tribunal's mandate to the interpretation and application of the SADC treaty and protocols in inter-State disputes. The protocol is not yet in force, and the Tribunal remains effectively suspended.

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205 Activity Report of the African Court on Human and Peoples' Rights, Executive Council, Forty Second Ordinary Session, 16 January–16 February 2023, EX.CL/1409(XLII), para 85.

206 *Omar Jallow v The Gambia* Application No 33/16 (ECOWAS Court, 10 October 2017) para 10.

207 *Katabazi and 21 Others v Secretary General of the East African Community* and Application No 1/2007 (East African Court of Justice, 29 August 2007).

208 *Mike Campbell (PTV) and Others v Zimbabwe* Application No 2/2007 (Southern African Development Community (SADC) Tribunal, 11 October 2007).

209 Michelo Hansungule, 'The Suspension of the SADC Tribunal' (2013) 35 Strategic Review for Southern Africa 135.

D. CONCLUSION

There is still room for the ACtHPR to develop the ACHPR's unique characteristics as well as for other human rights courts and bodies to draw inspiration from the ACHPR's features and the ACtHPR's case law. The ACmHPR and the ACtHPR continuously elaborate upon their functions and jurisdiction, respectively. They also develop the scope of rights and guarantees under the ACHPR. Although the practice of progressively elevating the level of protection for peoples' and individuals' rights may be arguably linked to the backlash consisting of the four States having withdrawn their declarations under article 34(6) of the Protocol, new States have recently deposited such declarations. Consequently, States' political choices about accepting/withdrawing their declarations allowing direct access to the ACtHPR need to be assessed in light of many factors. The ACtHPR's function is undermined by the low number of States accepting its jurisdiction for complaints brought by individuals and NGOs and the poor compliance record with its judgments. Despite these challenges, the ACtHPR is a resilient court addressing its increasing workload and evolving its case law.

BOX 21.3.3 Further Readings and Further Resources

Further Readings

- JT Gathii (ed), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (OUP 2020)
- C Heyns, 'The African Regional Human Rights System: In Need of Reform?' (2001) 2 African Human Rights Law Journal 155
- R Murray, *The African Charter on Human and Peoples' Rights* (OUP 2010)
- F Ouguergouz, *La Charte Africaine des Droits de l'Homme et des Peuples* (Graduate Institute Publication 1993)

Further Resources

- 'Documentary on the African Court on Human and Peoples' Rights' <www.youtube.com/watch?v=OfUNQIL9Zoc> accessed 20 August 2023
- 'YouTube Channel of the African Court on Human and Peoples' Rights' <www.youtube.com/@AfricanCourtEnglishChannel> accessed 20 August 2023
- Annual Activity Reports (*African Court on Human and Peoples' Rights*) <www.african-court.org/wpafc/activity-report/> accessed 20 August 2023

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§ 21.4 EUROPEAN HUMAN RIGHTS SYSTEM

JENS T. THEILEN

BOX 21.4.1 Required Knowledge and Learning Objectives

Required knowledge: Recurring Themes in Human Rights Doctrine

Learning objectives: Understanding the institutional setup and regional idiosyncrasies of human rights protection in Europe.

BOX 21.4.2 Interactive Exercises

Access *interactive exercises for this chapter*[210] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

The institutionalisation of rights in Europe has developed primarily within two organisations: the Council of Europe (CoE), with a broad range of member States extending to the east of Europe, on the one hand; and the European Union (EU) and its predecessors, the European Communities, on the other.[211] Under EU law, the primary reference point nowadays is the Charter of Fundamental Rights, which was originally proclaimed in 2000 and received formal legal force in 2009 under the Treaty of Lisbon (article 6 (1) TEU). Given the many particularities of the EU as a supranational legal order, the development and scope of its fundamental rights protection are beyond the remit of this chapter, except to note that it largely shares

210 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

211 As of 16 March 2022, Russia is no longer a member State of the CoE following its expulsion in reaction to the invasion of Ukraine; see *Resolution CM/Res(2022)2 (CoM, 16 March 2022)*.

the market-based outlook of EU law as a whole.[212] The focus in what follows will be on the human rights protection developed in the context of the CoE, notably but not exclusively the Convention for the Protection of Human Rights and Fundamental Freedoms – informally known as the European Convention on Human Rights (ECHR)[213] – and the European Court of Human Rights (ECtHR), whose task it is to interpret it. All 46 member States of the CoE are party to the ECHR. The EU is not, nor is it likely to be in the foreseeable future given concerns about the legality of accession to the ECHR under EU law.[214]

B. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

I. HISTORICAL ORIGINS AND DEVELOPMENT

The ECHR was the first treaty to be drafted under the auspices of the CoE and is still widely considered to be its crowning achievement. Originally a product of Western European States in the immediate post-war period, it was conceived of to prevent the backsliding of newly democratic States into totalitarianism and to provide a bulwark against the perceived threat of communism.[215] It is also worth noting that several of the States involved were major colonial powers. With the period of formal decolonisation not yet at its peak, they acted on the assumption that they would maintain their colonial territories for a significant time yet and drafted the ECHR in such a way that it would not run counter to their interests in doing so.[216] The ECHR thus 'embodies in its very text the contradictions between the proclamation of universal aspirations and realpolitik interests of political subjugation'.[217]

BOX 21.4.3 Example: Colonial Elements

A particularly stark example of this is the so-called colonial clause (article 56, previous article 63 ECHR), which puts the applicability of the ECHR and the possibility of individual complaints at the discretion of a State party for

212 Alexander Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (OUP 2011).

213 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

214 See *Opinion 2/13 (ECJ, 18 December 2014)*.

215 Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217; Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP 2011); Alexandra Huneeus and Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems' (2018) 16 ICON 136.

216 On this period, see González Hauck, § 1, in this textbook.

217 Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP 2015) 95.

'territories for whose international relations it is responsible'. It thus gives the option of placing (neo-)colonial acts outside the purview of the ECtHR. Far from being 'anachronistic', as the ECtHR has claimed, it is relevant to this day since various States parties continue to hold overseas territories and the ECtHR regards article 56 ECHR as 'a provision of the Convention which is in force and cannot be abrogated at will by the Court'.[218]

The ECHR was opened for signature in 1950 and came into force in 1953. From the very beginning, it has been supplemented by various protocols, which can broadly be divided into two groups. The first group, optional protocols, can enter into force despite not being ratified by all the States parties to the ECHR. According to the general principle of *pacta tertiis non nocent* (Latin: 'agreements do not harm third parties'),[219] they are binding only on those States which do ratify them,[220] and provide additional substantive guarantees (e.g. the rights to property, to education, and to free elections in Protocol No. 1) or procedural mechanisms for those States only. The second group, mandatory protocols, enter into force only after being ratified by all parties and amend the text of the ECHR itself. Most importantly, Protocol No. 11 to the ECHR fundamentally transformed the system of judicial oversight when it entered into force in 1998. While this system was originally conceived of as optional (and individual complaints were directed to the now-defunct European Commission of Human Rights, with the ECtHR acting only as a second instance), Protocol No. 11 turned the ECtHR into a permanent court with obligatory jurisdiction vis-à-vis all States parties – subject to the limitations of article 56 ECHR mentioned earlier. Another key change around the same time was the significant enlargement of the CoE, which generated a great deal of discussion as to whether and how the accession of many Central and Eastern European States to the ECHR should entail a different role for the ECtHR.[221]

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS PROCEDURES

The ECtHR is composed of 46 full-time judges (still with a clear male majority despite some tepid attempts to increase the number of women[222]), one for each State

218 Chagos Islanders v the United Kingdom *App no 35622/04 (ECtHR, 11 December 2012).*

219 On which, see Fiskatoris and Svicevic, § 6.1.B.II.4, in this textbook.

220 But see as the exception to the rule *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) paras 163–165; *Al-Saadoon and Mufdhi v the United Kingdom* App no 61498/08 (ECtHR, 2 March 2010) para 120, where the ECtHR controversially read the prohibition of the death penalty contained in Protocols No. 6 and 13 to the ECHR into article 3 ECHR although they were not (quite) unanimously ratified.

221 Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9 HRLR 397.

222 Stéphanie Hennette Vauchez, 'More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights' (2015) 26 EJIL 195; Helen Keller, Corina Heri, and

party. The majority of applications is dealt with by individual judges, committees of three judges, or Chambers of seven judges (articles 26 to 29 ECHR). Particularly important cases may be decided by the Grand Chamber consisting of 17 judges, either by relinquishment of jurisdiction by the Chamber (article 30 ECHR) or by referral at a party's request after the Chamber's judgment (article 43 ECHR).

The individual complaint procedure (article 34 ECHR) is the basis of the majority of applications to the ECtHR. Admissibility criteria (article 35 ECHR) include, inter alia, the ECHR's temporal and spatial applicability, the victim status of the applicant(s), the exhaustion of domestic remedies, and a four-month time limit (as of February 2022, according to Protocol No. 15 to the ECHR, previously six months). While seemingly of a formal nature, some of these requirements can become quite politically loaded and have generated as much case law and academic commentary as certain substantive provisions. This goes in particular for cases involving extraterritorial jurisdiction, which often relate to politically sensitive topics such as wartime measures, migration management, or – as in several pending cases – climate change.[223]

Compared to individual complaints, inter-State applications (article 33 ECHR) and advisory opinions at the request of the CoE's Committee of Ministers (article 47 ECHR) are significantly less common.[224] When they are used, however, inter-State applications tend to be high-profile cases, as with various cases brought by Georgia and Ukraine in the context of Russian invasions before Russia was expelled from the CoE. As of 2018, Protocol No. 16 to the ECHR, an optional protocol, allows the ECtHR to also give advisory opinions at the request of the highest national courts with regard to cases pending before the latter. Protocol No. 16 is viewed by many as an important step towards strengthening judicial dialogue between national courts and the ECtHR,[225] but it remains to be seen to what extent national courts will make use of the new procedure.[226]

III. CURRENT DISCUSSIONS AND FUTURE CHALLENGES

An idiosyncrasy of the ECtHR compared to other regional human rights courts is the extremely high number of cases it deals with: in 2022, for example, 45,500 new

Myriam Christ, 'Fifty Years of Women at the European Court of Human Rights' in Freya Baetens (ed), *Identity and Diversity on the International Bench: Who Is the Judge?* (OUP 2020).

223 E.g. *Banković and others v Belgium and others* App no 52207/99 (ECtHR, 12 December 2001); *Al-Skeini and others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011); *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

224 The most recent Advisory Opinion is of 22 January 2010 *on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)*.

225 See e.g. the *speech by Guido Raimondi, then President of the ECtHR, at the high-level conference* '*Continued Reform of the European Court of Human Rights Convention System – Better Balance, Improved Protection*' *Copenhagen, April 2018*.

226 At the time of writing, the ECtHR has rendered seven advisory opinions under Protocol No. 16.

applications were allocated and overall 74,650 applications were pending. (By way of contrast, the number of pending cases before the IACtHR and the AfCtHR does not exceed three-digit numbers.) While legal analysis often focuses on 'landmark cases' which deal with politically sensitive topics or develop the material standards set by the ECtHR, the overwhelming majority of applications are disposed of by means of an admissibility decision. Protocol No. 14 to the ECHR, a mandatory protocol, introduced various measures to streamline the procedure for such decisions and thereby manage the case load: for example, single judges may now declare cases inadmissible (article 27 ECHR), and applicants must usually have suffered a 'significant disadvantage' for their application to be considered admissible (article (3) lit. b ECHR).[227]

Another area of discussion, particularly in recent years, concerns the legitimacy of the ECtHR and the *backlash* its case law has generated, particularly in cases on prisoners' voting rights[228] and immigration.[229] This has led to increasing fears that the efficiency of the Strasbourg system might be endangered if the States parties were to withdraw their support. In particular, the State parties might no longer regularly abide by the ECtHR's judgments: while these are legally binding and their execution is supervised by the CoE's Council of Ministers (article 46 ECHR), there is no truly effective mechanism to ensure compliance.[230] Some States claim primacy for their national constitutions over the ECHR and use this internal legal hierarchy to prevent the implementation of certain judgments.

Debates on how the ECtHR should respond in such a situation involve questions of judicial strategy and principle, often connected to doctrinal figures such as the margin of appreciation and the notion of subsidiarity.[231] But these discussions also draw attention to the limits of what is considered possible within institutionalised human rights protection: if even incremental change is controversial and may draw the ire

227 On the controversies these changes have led to, see e.g. Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12 HRLR 655; Dinah Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights' (2016) 16 HRLR 303; Janneke H Gerards and Lize R Glas, 'Access to Justice in the European Convention on Human rights System' (2017) 35 NQHR 11.

228 Particularly Anchugov and Gladkov v Russia *App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013)*; Hirst v the United Kingdom (No. 2) *App no 74025/01 (ECtHR, 6 October 2005)*.

229 Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP 2015) 1. See generally on 'backlash' and responses to it Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197; Silvia Steininger, 'With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes' (2021) 81 ZaöRV 533; see also Kunz, § 5 C.II, in this textbook.

230 For an overview and evaluation, see Raffaela Kunz, 'Securing the Survival of the System: The Legal and Institutional Architecture to Supervise Compliance with the ECtHR's Judgments' in Rainer Grote, Mariela Morales Antoniazzi, and Davide Paris (eds), *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021) 12.

231 On standards of review in international human rights law, see Milas, § 21.1, in this textbook.

of the States parties to such an extent, then more fundamental forms of injustice are bound to go unchallenged.[232]

C. OTHER COUNCIL OF EUROPE TREATIES AND DOCUMENTS

Human rights protection within the CoE is shaped by the ideological distinction between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other.[233] The ECHR's guarantees focus on the prior, although they cannot be entirely separated from the latter.[234] Some economic and social rights, particularly various labour rights and the right to social security, are guaranteed in the European Social Charter (ESC), which was first adopted in 1961 and is gradually being replaced by a revised version of 1996. Many rights included in the International Covenant on Economic, Social and Cultural Rights are notably absent at the European level: 'private property is a right for Europeans, but food is not'.[235]

These priorities are reflected in the institutional and procedural design of the European Committee of Social Rights, which is responsible for monitoring compliance with the ESC. It does so primarily by reference to reports submitted by the States parties (comparable with the reporting system in place for many human rights treaties at the global level[236]). An additional protocol from 1995 further introduced the possibility of collective complaints, for example by trade unions and certain non-governmental organisations with consultative status within the Council of Europe. As of 2023, however, it has been ratified only by 14 States. In stark contrast to the ECtHR, there is no complaint procedure for individuals.

To round off the picture, it is worth gesturing towards the manifold other treaties developed under the auspices of the CoE, many of which can be considered specialised human rights treaties or at least touch upon human rights issues, such as data protection or the legal status of migrant workers. Some of these treaties, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and the Council of Europe Convention on preventing and combating violence against women and domestic violence, are equipped with a monitoring body which provides more specific but not legally binding guidance. The ECtHR at times refers to these treaties and other documents as part of its interpretation of the ECHR,[237] thus

232 Jens T Theilen, *European Consensus between Strategy and Principle* (Nomos 2021) chs 9–11.

233 See Ciampi, § 21.B.I., in this textbook.

234 Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (CUP 2018).

235 Jose Luis Vivero Pol and Claudio Schuftan, 'No Right to Food and Nutrition in the SDGs: Mistake or Success?' [2016] BMJ Global Health 1, 3.

236 See Ananthavinayagan and Baranowska, § 21.2, in this textbook.

237 Lize R Glas, 'The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents' (2017) 17 HRLR 97; Theilen (n 232) ch 6.

indirectly giving them binding legal force even when this was not envisaged at the time of their drafting or when they are not widely ratified.

D. CONCLUSION

Overall, what stands out in the European system of human rights protection is the elevated position granted to the ECtHR and, with it, the focus on civil and political rights in a highly institutionalised form. This brings with it in particularly stark form all the advantages and disadvantages of institutionalising human rights.[238] In the European self-perception, the ECtHR is often lauded as a beacon of human rights protection, to be emulated by other regions.[239] The ECtHR has indeed contributed significantly to the development of human rights in Europe over the years, but this assessment should not distract from the cautious and oftentimes timid stance which it tends to take in its judgments: on topics ranging from religious freedom over gay and trans rights to racial violence, other regional courts and quasi-judicial bodies at the global level have challenged injustices by finding human rights violations while the ECtHR demurred.[240] It is important, then, to not overemphasise the achievements of the ECtHR but rather to read its case law with a critical eye[241] and to remain alert to other approaches to human rights, both in Europe and elsewhere.[242]

BOX 21.4.4 Further Readings and Further Resources

Further Readings

- HP Aust and E Demir-Gürsel (eds), *The European Court of Human Rights. Current Challenges in Historical Perspective* (Edward Elgar 2021)
- RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 EJIL 417
- J Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019)

238 On the critique of (institutionalised) rights, see further Ananthavinayagan and Theilen, § 21.8, in this textbook.

239 E.g. Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 GLJ 1862.

240 For criticism, see e.g. Eva Brems and others, 'Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts' (2017) 39 HRQ 882; Damian A Gonzalez Salzberg, *Sexuality and Transsexuality Under the European Convention on Human Rights* (Hart 2019); Ruth Rubio-Marín and Mathias Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2015) 26 EJIL 881.

241 On critique of human rights, see Ananthavinayagan and Theilen, § 21.8, in this textbook.

242 On case analysis, see also Milas, § 4.1, in this textbook.

- C Heri, *Responsive Human Rights. Vulnerability, Ill-Treatment and the ECtHR* (Hart 2021)
- E Demir-Gürsel and JT Theilen, 'Framing Europe in Human Rights, Framing Human Rights in Europe – Authoritarianism, Migration, and Climate Change in the Council of Europe' (2023) 12/4 ESIL Reflections 1

Further Resources

- The website of the ECtHR includes various factsheets on different topics within its case law as well as other helpful summaries <www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=> accessed 20 August 2023
- There are several excellent blogs covering developments related to the ECtHR; see in particular *Strasbourg Observers* (providing case notes for important judgments of the ECtHR <https://strasbourgobservers.com/> accessed 20 August 2023), *ECHR Blog* (with a wide variety of content including updates on institutional developments and new academic publications <www.echrblog.com/> accessed 20 August 2023) and *ECHR Sexual Orientation Blog* (focusing on case law related to sexual orientation <http://echrso.blogspot.com/> accessed 20 August 2023)

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§ 21.5 INTER-AMERICAN HUMAN RIGHTS SYSTEM

VERENA KAHL, WALTER ARÉVALO-RAMÍREZ, AND ANDRÉS ROUSSET-SIRI

BOX 21.5.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Human Rights Law; Indigenous Peoples; TWAIL; Decolonisation

Learning objectives: Understanding the activity and the scope of the human rights protection bodies and instruments in the Americas.

BOX 21.5.2 Interactive Exercises

Access *interactive exercises for this chapter*[243] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

In April 1948, after the end of a devastating Second World War, delegates from 21 countries met in Bogotá, Colombia, to strengthen cooperation among American States. In their quest for institutionalisation, they created the Organization of American States (OAS), which today comprises 35 member States. During the Ninth International Conference of American States, the first international human rights instrument of a general nature was adopted,[244] which laid the foundation for the Inter-American Human Rights System: the American Declaration of the Rights and Duties of Man (ADRDM).

243 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/

244 Inter-American Commission of Human Rights, Annual Report 2019, OEA/Ser.L/V/II. Doc. 9, 24 February 2020, para 48.

While the Inter-American human rights system had thereby formally been established even shortly before the Universal Declaration of Human Rights came into being, it took several years before the system actually went into operation. An important driver of this operationalisation was the adoption of the American Convention on Human Rights (ACHR),[245] a legally binding human rights instrument which established the Inter-American Court of Human Rights (IACtHR) as a competent organ alongside the Inter-American Commission on Human Rights (IACmHR), which had already been established by a resolution of the OAS in 1959. With regard to institutional safeguards, the Inter-American human rights system thus follows a twofold structure, which can also be found in the African human rights system and had formerly been applied in the European system of human rights.[246] Besides this institutional setting, it is important to note that the Inter-American human rights system developed in the context of long-lasting dictatorships and civil wars in the region, which also shaped the system's case law.[247]

In comparison to its European[248] and African[249] counterparts, distinguishing features include a unique system of reparations, intensive use of the IACtHR's advisory function and remarkable case law with regard to specific topics, such as indigenous communities, forced disappearance, amnesty laws, or environmental rights.[250] One of the main challenges of the Inter-American system is, besides continuous financial constraints,[251] to find an adequate position in the balancing act between progressive human rights protection on the one hand and member State protest on the other hand, which can go as far as turning away from the system itself.[252]

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245 American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

246 See Philip Leach, 'The European Court of Human Rights: Achievements and Prospects' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018) 425.

247 See Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection? for Regional Rights Protection?' (2010) 9(4) Washington University Global Studies Law Review 639, 660, 666 f, 670.

248 On the European human rights system, see Theilen, § 21.4, in this textbook.

249 On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

250 Emblematic decisions on these topics include, inter alia, IACtHR, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, 15 November 2017, Series A No. 23; IACtHR, Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina (Merits, Reparations and Costs) Judgment, 6 February 2020, Series C No. 400; IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs) Judgment of 17 June 2005, Series C No. 125; IACtHR, Case of Barrios Altos v. Peru (Merits), Judgment of 14 March 2001, Series C No. 75.

251 See, by mode of example, Raffaela Kunz, 'The Inter-American System Has Always Been in Crisis, and We Always Found a Way Out' An interview with Eduardo Ferrer Mac-Gregor Poisot (*Völkerrechtsblog*, 17 October 2016) <https://voelkerrechtsblog.org/de/the-inter-american-system-has-always-been-in-crisis-and-we-always-found-a-way-out/> accessed 20 August 2023.

252 Note the ACHR's denunciations of Trinidad Tobago (1998) and Venezuela (2012), while the latter re-ratified the Convention in 2019, see <www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 20 August 2023.

B. LEGAL FRAMEWORK

I. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The ADRDM was signed on 2 May 1948. Following natural law theory,[253] the American Declaration emphasises that 'the essential rights of [a hu]man are not derived from the fact that he[⋆she] is a national of a certain state, but are based upon attributes of his[⋆her] human personality'. Besides traditional civil and political rights, it also includes economic, social and cultural rights which, for the most part, were at that time not yet part of the signatory States' national legal systems.[254] While the ADRDM is not constructed as a treaty and by its nature not legally binding, it has both been considered as a means of interpretation regarding the ACHR and the OAS Charter[255] and even as 'a source of international obligations for the Member States of the OAS'.[256] In this sense, the ADRDM has served as a yardstick in cases before the IACmHR regarding those American countries that have not ratified the ACHR.[257]

II. AMERICAN CONVENTION ON HUMAN RIGHTS

The ACHR was adopted during the Inter-American Specialized Conference on Human Rights, which took place in 1969 in San José, Costa Rica. Pursuant to article 74(2), the ACHR entered into force in 1978. Currently, 24 States have ratified the ACHR. In 1998, Trinidad and Tobago denounced the Convention. Venezuela, which had also presented an instrument of denunciation in 2012, decided to re-ratify the Convention in 2019. Although the ACHR is, according to article 74(1), open to all OAS member States for signature and ratification, the United States, Canada, and several other English-speaking countries have not ratified the Convention.

The ACHR can be considered the legal centrepiece of the Inter-American human rights system. It is divided into three parts, from which the first enshrines fundamental human rights and corresponding State obligations (articles 1–32), the second establishes the means of protection (articles 33–73), and the third consists of general and transitory provisions (articles 74–82). The main focus of the ACHR lies on the protection of traditional civil and political rights, such as the right to life (article 4), the right to humane treatment (article 5), the right to personal liberty (article 7), the right to a fair trial (article 8),

253 Robert K Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31(4) Human Rights Quarterly 856, 859.

254 Cf. Ibid 860.

255 See IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Series A No. 10, para 44.

256 Ibid paras 42, 45.

257 IACmHR, James Terry Roach and Jay Pinkerton v. United States, Case 9647, Resolution No. 3/87, Annual Report 1986–1987, 22 September 1987, paras 47–49; for the case of Canada, see Bernard Duhaime, 'Canada and the Inter-American Human Rights System: Time to Become a Full Player' (2012) 67(3) International Journal 639, particularly 641 f.

freedom of thought and expression (article 13), or the right to judicial protection (article 25). However, article 26 provides for the progressive and full realisation of the rights 'implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States', which has been used to innovatively incoporate second generation rights, such as job security or a healthy environment.[258]

Besides the rights and freedoms expressly codified in the ACHR, other rights have been read into the Convention through progressive interpretation. Particularly worth mentioning is the right to (know) the truth, whose emergence is related to the systematic practice of forced disappearance in situations of civil war or dictatorship that have for long periods dominated large parts of the Inter-American hemisphere.[259]

III. OTHER RELEVANT INSTRUMENTS

The diversification of international human rights law in the decades following the Universal Declaration of Human Rights has equally taken place in the context of the Inter-American human rights system connecting to the historical process of human rights codification in different subsequent agreements. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights was adopted in November 1988 and entered into force only 11 years later in 1999.

Similarly, human rights expansion in international and regional treaty law was directed towards groups that suffer from structural discrimination or generally require specific protection, such as women, Black, indigenous and people of colour, persons with disabilities, or children. Besides a general agreement on non-discrimination, the Inter-American Convention against all Forms of Discrimination and Intolerance, several other instruments were adopted with regard to specific groups. These include, inter alia, the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; the Inter-American Convention on International Traffic in Minors; or the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. Taking into account the presence of many indigenous communities in the region, the OAS General Assembly has also adopted the American Declaration on the Rights of Indigenous Peoples.

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258 Oswaldo R Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties – Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31(2) Netherlands Quarterly of Human Rights 159, 160; IACtHR, Case of Lagos del Campo Vs. Peru (Preliminary Objections, Merits, Reparations and Costs), Judgment of 31 August 2017, Series C No. 340, paras.141-154; IACtHR, Case of Dismissed Employees of Petroperú et al. Vs. Peru (Preliminary Objections, Merits, Reparations and Costs), Judgment of 23 November 2017, Series C No. 344 (in Spanish only), paras. 192, 193; IACtHR, Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) Vs. Argentina (Merits, Reparations and Costs), Judgment of 6 February 2020, paras. 201, 202–209.

259 IACHR, 'The Right to the Truth in the Americas', 13 August 2014, OEA/Ser.L/V/II.152 Doc. 2, paras 43, 56 et seq.

C. INSTITUTIONAL FRAMEWORK

I. INTER-AMERICAN COURT OF HUMAN RIGHTS

The IACtHR was created as a permanent and autonomous organ of the OAS by the ACHR in 1969. As the Convention did not enter into force until 1978, it took a decade for the Court to make it from paper to an actual operating institution. In 1979, the IACtHR's first judges were elected and the Court was officially installed.

1. Composition

According to article 52(1) ACHR, the IACtHR is composed of seven judges which have to be OAS member State nationals and jurists of the highest moral authority and of recognised competence in the field of human rights. They are elected by the OAS General Assembly for a term of six years with the possibility of a single re-election (article 54(1) ACHR). Since the election in November 2021, for the first time in the history of the IACtHR there have been three women among the sitting judges.[260]

2. Jurisdiction and Functions

According to article 1 of its Statute, the IACtHR is an 'autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights'. Article 2 of the Statute describes the functions of the Court as twofold. First, in the realm of its judiciary or contentious function, which is governed by articles 61 to 63 of the ACHR, the Court has the competence to hear and rule on cases submitted by the IACHR or a State Party to the Convention (article 61(1) ACHR), provided that the State, which is party to the case, has recognised the Court's jurisdiction according to article 62(3) ACHR and that the procedure before the Commission enshrined in articles 48 to 50 ACHR has been exhausted (article 61(2) ACHR). For cases to reach the IACtHR, States must have recognised the jurisdiction of the Court pursuant to article 62(1) ACHR. In addition, based on article 63(1) ACHR, the Court has ordered a great variety of reparatory measures,[261] which has become a distinguishing feature of its jurisprudence.[262] In contrast to its regional counterparts, the IACtHR has also developed an innovative network of institutions and procedures to supervise compliance with its decisions in accordance with articles 67 and 68(1) ACHR,[263] including monitoring mediums such as requests for information,

260 Corte Interamericana sesionará con cuatro hombres y tres mujeres, Servindi, 17 November 2021 <www.servindi.org/actualidad-noticias/17/11/2021/corte-interamericana-sesionara-cuatro-hombres-y-tres-mujeres> accessed 20 August 2023.

261 Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2013) 188 ff.

262 Dinah Shelton, 'Remedies in the Inter-American System' (1998) 92 Proceedings of the Annual Meeting (American Society of International Law) 202, 203.

263 IACtHR, Annual Report of the Inter-American Court of Human Rights 2010, San José 2011, p. 9 et seq.

monitoring hearings, on-site visits, and issuing orders on monitoring compliance.[264] Second, article 64 ACHR provides for an advisory function. Due to a lack of contentious cases during its first years of operation, the IACtHR built its jurisprudence by relying heavily on its responses to requests for advisory opinions.[265]

II. INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

Like the IACtHR, the IACmHR has seven members, who must have high moral authority and a recognised understanding of human rights law. The Commission has 11 rapporteurs on indigenous peoples, women, freedom of expression, children, human rights defenders and justice operators, persons deprived of liberty, LGBTI persons, migrants, rights of Afro-descendants and against racial discrimination, older persons, economic, social, cultural, and environmental rights that prepare specialised recommendations addressed to OAS member States and advise the Commission in the processing of petitions.

Three types of reports are produced by the IACmHR: country reports; reports where the results of the in loco visit (on-site visit) for OAS States are condensed; and thematic reports on specific topics and annuals report, which includes data on the processing of petitions, the activities carried out in relation to the IACtHR, and other human rights bodies.

The IACmHR decides cases in a quasi-judicial manner after receiving individual petitions (article 44 ACHR) and inter-State communications (article 45). The jurisdictional procedure before the IACHR is divided into four procedural stages: initial processing, admissibility, merits, and referral of the case to the Court. Thereby, the IACmHR acts as a gatekeeper for cases before they are submitted to the IACtHR. In the merits stage, if the Commission determines that there is State responsibility for an international wrongful act, it will issue a preliminary report that will be notified to the State (article 50). If within the time period conferred, the State does not comply with the recommendations made by the IACmHR, it will decide between issuing the report on the merits (article 51) and publishing it or referring the case to the IACtHR.

D. MONITORING COMPLIANCE WITH JUDGMENTS

1. EFFECTIVENESS

Compliance with judgments of the IACtHR is still relatively low, with only 44 of 365 rulings submitted for full implementation to date (July 2023). The progress of

264 For a detailed overview, see Rene Urueña, 'Compliance as Transformation: The Inter-American System of Human Rights and Its Impact(s)' in Rainer Grote, Mariela Morales Antoniazzi, and Davide Paris, *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021) 226, 233–237.

265 See Thomas Buergenthal, 'Remembering the Early Years of the Inter-American Court of Human Rights' (2005) 37 New York University Journal of International Law and Politics 259, 265 f.

compliance with the measures ordered by the IACtHR is influenced by the (lack of) domestic implementation of the IACHR and structural (non-)compliance with human rights standards. Problems are caused by the general ignorance of international law, the lack of prior debate on how to comply, or even unwillingness to comply with the rulings of the Inter-American adjudicative bodies. This generates a notable gap between decisions and their execution.

2. JUDGMENTS ON SUPERVISION

The part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State (article 68.2). The IACtHR issues specific judgments on supervision where it condenses the information collected and progress in compliance, which is then described and compiled in its annual report. Pursuant to article 65 ACHR, the IACtHR must submit a report each year to the General Assembly of the OAS in which it indicates – among other things – the cases in which a State has not complied with a judgment of the IACtHR.

E. THE DOCTRINE OF 'CONVENTIONALITY CONTROL'

The doctrine of conventionality control is one of the most effective efforts of the IACtHR to increase the level of compliance with the ACHR. The concept of conventionality control was developed in the concurring opinion of Judge Sergio García-Ramírez in the judgment for the *Mack Chang v Guatemala* case.[266] Two years later, in the *Almonacid-Arellano* case,[267] the IACtHR, for the first time, used the notion in the reasoning of one of its decisions.

Conventionality control is a guarantee designed to obtain the harmonious application of international and domestic law. This, according to the jurisprudence of the IACtHR includes all organs of the State, at all levels, within the framework of their competences. It encompasses both the ACHR as well as specialised treaties of the Inter-American human rights system. It also includes the decisions of the IACtHR, both in its contentious and advisory jurisdiction. The doctrine allows the repeal of internal regulations incompatible with the ACHR, but at the same time it functions as a parameter to eradicate practices contrary to the rules of the Inter-American human rights system.

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266 IACtHR, Case of Myrna Mack Chang v. Guatemala (Merits, Reparations and Costs), Judgment of 25 November 2003, Series C No. 101 Reasoned concurring opinion of Judge Sergio García Ramírez, p. 2.

267 IACtHR, Case of Almonacid-Arellano et al v. Chile (Merits, Reparations and Costs), Judgment of 26 September 2006, Series C No. 154, para 124.

The IACtHR recognises two types of conventionality control. The first type, known as *internationally performed conventionality control*, is carried out by the judges of the IACtHR when the Court, as part of its decisions, orders the suspension, revision, or withdrawal of domestic norms of the State.[268] The second type, known as *national conventionality control*, implies that every organ or agent of the State is capable to perform a control of conventionality to the extent of its competences. Accordingly, all State authorities must interpret and apply all domestic laws in a way that complies with the Convention, its protocols, and the case law of the IACHR and the IACtHR. Thereby, the national conventionality control ensures that no State authority applies a norm contrary to the Convention.

F. CONCLUSION

The present contribution took a closer look at the institutions and legal framework of the Inter-American human rights system with a particular focus on the corresponding case law and specific distinguishing features of its two institutional pillars: the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. Besides covering core provisions of the American Convention on Human Rights as well as the composition, jurisdiction and functions of Court and Commission, the chapter also casted a spotlight on the monitoring of compliance with the IACtHR's decisions, which distinguishes the Inter-American human rights system from its European and African counterparts. Finally, the contribution dived deeper into the doctrine of 'conventionality control', which is of particular importance for the implementation of Inter-American human rights standards at the domestic level.

BOX 21.5.3 Further Readings and Further Resources

Further Readings

- JL Cavallaro, C Vargas, C Sandoval, B Duhaime, *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System* (OUP 2019)
- Y Haeck, O Ruiz-Chiriboga, and C Burbano-Herrera, *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersentia 2015)
- L Hennebel and H Tigroudja, *The American Convention on Human Rights: A Commentary* (OUP 2022)
- JM Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP 2013)

268 IACtHR. Caso Vargas Areco v. Paraguay (Merits, Reparations and Costs), Judgments of 26 September 2006. Serie C No. 155, Reasoned concurring opinion of Judge Sergio García Ramírez, p. 6.

- X Soley and S Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 International Journal of Law in Context 237

Further Resources

- Annual reports with detailed information and statistics on the Court's jurisprudence are published in four different languages <www.corteidh.or.cr/informes_anuales.cfm?lang=en> accessed 20 August 2023
- The IACtHR regularly publishes Journals of Jurisprudence (Cuadernillos de Jurisprudencia) concerning specific topics and member States, available in Spanish only at <www.corteidh.or.cr/publicaciones.cfm?lang=en> accessed 20 August 2023
- Interactive Map of member States with updated information on pending cases, cases with judgment and provisional measures, <www.corteidh.or.cr/mapa_casos_pais.cfm?lang=en> accessed 20 August 2023
- The movie 'Helena from Sarayaku' (2022) directed by Eriberto Gualinga follows Helena and the indigenous community of the Kichwa people of Sarayaku in their struggle to protect their ancestral lands and the 'living forest'

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§ 21.6 ARAB AND ISLAMIC HUMAN RIGHTS SYSTEM

ADAMANTIA RACHOVITSA

BOX 21.6.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Individuals; Recurring Themes in Human Rights Doctrine

Learning objectives: Understanding the basic substantive and institutional features of the Arab/Islamic human rights mosaic.

BOX 21.6.2 Interactive Exercises

Access *interactive exercises for this chapter*[269] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

The geographies of the 'Middle East', 'Arab region', or 'Islamic world' are difficult to capture. Regional arrangements of States involving these geographies do not fall squarely into the orderly and familiar forms of regionalism.[270] Take the example of the League of Arab States: a regional organisation of 22 States across two continents. The Organisation of Islamic Cooperation defies geographical distance, bringing together 57 member States (with a population of over 1.8 billion) across four continents. One should also note that a number of States belonging in these regional arrangements are also members to the African Union[271] and parties to the African Charter on Human

269 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

270 Antony T Anghie, 'Identifying Regions in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1058.

271 For example, Egypt, Libya or Morocco.

and Peoples' Rights.[272] In these instances, groupings of States are not driven solely by physical proximity but mostly by a 'regionalism of ideas'[273] and various markers of common identity, such as Arab heritage and Islamic solidarity. Therefore, it does not come as a surprise that these regional arrangements are reflected in a diversity of treaties and instruments on human rights.[274]

The sub-chapter starts with discussing two early Islamic human rights documents which, although non-binding, seem to have set the tone for the Arab/Islamic human rights system. The discussion then focuses on the institutional and substantive aspects of protecting human rights in the League of Arab States, including the Arab Independent Committee on Human Rights and the Revised Arab Charter on Human Rights. Finally, some insights are highlighted from the more recent Gulf Cooperation Council Declaration on Human Rights.

B. EARLY ISLAMIC HUMAN RIGHTS DOCUMENTS

Two Islamic documents concerning human rights protection, which have taken the form of international declarations and are therefore non-binding, stand out. The first document is the 1981 Universal Islamic Declaration of Human Rights. It was prepared under the auspices of the Islamic Council of Europe, which is a private, London-based organisation affiliated with the Muslim World League, an international non-governmental organisation (NGO)[275] headquartered in Saudi Arabia that tends to support the views of conservative Muslims. The second instrument, influenced by the Universal Islamic Declaration of Human Rights, is the Cairo Declaration on Human Rights in Islam, adopted by the Organisation of Islamic Cooperation in 1990.[276] The Cairo Declaration on Human Rights in Islam was the contribution of the Organisation of Islamic Cooperation to the 1993 World Conference on Human Rights. In line with the Organisation of Islamic Cooperation's religious nature, the Cairo Declaration on Human Rights in Islam contains consistent references to Islamic law (also known as Sharia).[277]

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272 For example, Egypt, Libya or Morocco. On the African human rights system, see Rachovitsa, § 21.3, in this textbook.

273 Malcolm D Evans, 'The Future(s) of Regional Courts on Human Rights' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 261, 271.

274 On how the notions of diversity and coherence play out in the regional development of the Asian system of human rights, see Rachovitsa, § 21.7, in this textbook.

275 On NGOs, see Chi § 7.6, in this textbook.

276 Cairo Declaration on Human Rights in Islam, adopted 5 August 1990 by the Conference of Foreign Ministers of the Organisation of the Islamic Conference, Resolution 49/19-P.

277 For the basic sources of Islamic law also known as Sharia, see Christopher G Weeramantry, *Islamic Jurisprudence – An International Perspective* (Macmillan 1998) 30–58; Mashood A Baderin, *International Human Rights and Islamic Law* (OUP 2005) 33–48.

Many of the rights and freedoms contained in both the Cairo Declaration on Human Rights in Islam and the Universal Islamic Declaration of Human Rights fall short of universal standards, as encapsulated in the international bill of rights,[278] as well as from an Islamic perspective. This is because, in many instances, the language and scope of rights provided in these documents do not measure up to Islamic standards of human rights.[279] Two notable examples of how the rights and freedoms contained in these two documents fall short of universal human rights standards concern the scope of rights of women (e.g. women's right to work, polygamy, right to inheritance, equality of rights in marriage) and freedom of religion.[280]

A defining feature of both the Cairo Declaration on Human Rights in Islam and the Universal Islamic Declaration of Human Rights is that they subject the exercise of human rights to Islamic law. The Cairo Declaration on Human Rights in Islam states that 'all the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia' (article 24). The Universal Islamic Declaration of Human Rights lacks such an explicit clause but clarifies that any reference to law, to which human rights are subordinated throughout the text, denotes Sharia.[281]

BOX 21.6.3 Advanced: Legal Challenges of Unconditionally Subjecting the Exercise of Human Rights to Islamic Law

Unconditionally subjecting the enjoyment of internationally protected rights to Islamic law is as problematic as subjecting them to domestic law, since this renders the scope of rights and freedoms uncertain. This uncertainty is further amplified by concerns regarding Islamic law and, in particular, its foreseeability, predictability, and accessibility. The content of Islamic law is frequently elusive due to the lack of codification and the different schools of Islamic thought. There is no systematisation of the case law and, in fact, judgments in the Middle East or Arab region are not published. Moreover, since the protective scope of the rights is subjected to Islamic law, there is no clarification of what this means with respect to different interpretations of Islamic law in case of differences in jurisprudential views and across schools of thought.

278 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

279 Mashood A Baderin, 'The Human Rights Agenda of the OIC: Between Pessimism and Optimism' in Marie J Petersen and Turan Kayaoglu (eds), *The Organization of Islamic Cooperation and Human Rights* (University of Pennsylvania Press 2019) 40, 51–52.

280 On the rights of women under Islamic law and human rights law, see Baderin (n 277) 133–155.

281 Explanatory note 1(b).

An additional notable characteristic of the Cairo Declaration on Human Rights in Islam and the Universal Islamic Declaration of Human Rights is that they set out a series of individual duties towards society[282] and duties of the community towards the individual. Such duties express Arab and Islamic ideals of social justice and a community-oriented approach to human rights. These ideals and approaches have contributed to the apparatus of positive human rights law and may also advance novel perspectives for conceptualising aspects of human rights law as well as alternative systems for protecting human dignity.[283]

Overall, the rationale for creating the Islamic human rights documents is not clear. Both the Cairo Declaration on Human Rights in Islam and the Universal Islamic Declaration of Human Rights were intended to develop an Islamic response to the Universal Declaration on Human Rights.[284] Many also argue that the underlying rationale of these Islamic human rights documents as well as the specific encapsulation of rights therein are intended more as rhetorical devices serving political interests, ideologies, and (perceived) hegemonic politics and repressive policies of certain autocratic regimes.[285]

C. THE PROTECTION OF HUMAN RIGHTS IN THE LEAGUE OF ARAB STATES

The League of Arab States, based in Cairo, has 22 member States. Non-interference in domestic affairs is a key policy of the League of Arab States, which is historically linked to decolonisation[286] and pan-Arab nationalism forged during and in the aftermath of the independence of many Arab States.[287] In contrast to the Organisation of Islamic Cooperation, the League of Arab States is primarily a non-religious organisation.

I. ARAB INDEPENDENT COMMITTEE ON HUMAN RIGHTS

The Arab Independent Committee on Human Rights (Committee) is a body of the League of Arab States, established in 1998. The Committee meets twice per year in

282 For discussion on the notion of the duties of the individual see Rachovitsa, § 21.3, in this textbook.

283 Weeramantry (n 277) 125–127; Patrick Glenn, *Legal Traditions of the World* (OUP 2014) 224.

284 International Law Association, Committee on Islamic Law and International Law, *Islamic Law and the Rule of Law in Light of the Right to Freedom of Expression*, Final Report, 7 November 2018, para 80.

285 Ibid; Salim Farrar, 'The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?' (2014) 12 Chinese Journal of International Law 787, 802–805; Ann E Mayer, *Islam and Human Rights* (Westview Press 2007) 192–197.

286 On decolonisation, see González Hauck, § 1, in this textbook.

287 For discussion on the Third World approaches in international law, see González Hauck, § 3.2, in this textbook. For critique on human rights and discussion of human rights as a colonial construction, see Ananthavinayagan and Theilen, § 21.8, in this textbook.

Cairo and consists of one political representative from each member State. According to its mandate,[288] the Committee is responsible for:

- Establishing rules of cooperation among member States in the field of human rights
- Formulating an Arab position on human rights issues at the regional and international levels
- Drafting human rights treaties and assessing the compatibility of agreements with human rights principles
- Promoting the implementation of human rights
- Promoting cooperation in human rights education.

Despite its broad mandate on paper, the Committee is limited to considering issues referred to it by specific bodies of the League of Arab States or member States. It has neither a mechanism to consider the human rights situation in member States nor any special procedures.

II. THE REVISED ARAB CHARTER ON HUMAN RIGHTS

The Revised Arab Charter on Human Rights (Charter)[289] was adopted in 2004 and entered into force in 2008. As of January 2021, 16 out of 22 member States to the League of Arab States have ratified the Charter.[290] The Charter affirms the universality and indivisibility of human rights (article 1) and contains a clause safeguarding the more favourable level of protection for the individual (article 43). The text of the treaty ensures peoples' right to self-determination (article 2) and safeguards key civil and political rights (articles 5–33) and many economic, social, and cultural rights (articles 34–42). There are a few novel provisions, too, such as the right to a decent life for persons with mental or physical disability (article 40).

Nonetheless, the Charter presents certain shortcomings. First, it omits important human rights. For instance, it does not prohibit cruel, inhuman, or degrading punishment but only treatment (see article 8(1)). This is troubling, since many States in the region retain corporal forms of punishment that may be in violation of the Convention Against Torture.[291] Some rights are protected only with regard to State parties' own citizens, such as the right to association and peaceful assembly (article 24(6)) and most economic and social rights. Second, the death penalty may be imposed on

288 Internal Regulations of the Arab Permanent Committee on Human Rights, adopted by Resolution 6826, Regular Session 1285 of the Council of Ministers of Foreign Affairs, September 2007.

289 Revised Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 18 Human Rights Law Journal 151.

290 These are Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Palestine, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates, and Yemen. Comoros, Djibouti, Morocco, Oman, Somalia, and Tunisia have not yet ratified the Charter.

291 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

minors, if stipulated in a State party's domestic law (article 7(1)). Third, women's rights are not sufficiently protected in accordance with international standards. Fourth, the Charter contains so-called claw-back clauses, as is the case with the African Charter on Human and Peoples' Rights.[292]

III. MONITORING THE REVISED ARAB CHARTER

1. The Arab Human Rights Committee

The Arab Human Rights Committee, created in 2009, is the treaty body entrusted with supervising the implementation of the Revised Arab Charter (articles 45–48). The Committee consists of seven independent human rights experts who serve in a personal capacity.

The Committee is responsible for monitoring States' human rights performance and reviewing State reports. The Committee cannot receive individual complaints. States parties are required to submit a report on their compliance with the Charter within one year of ratification, and thereafter every three years. The Committee reviews these reports and issues conclusions and recommendations. Civil society organisations can submit reports and attend meetings. Although the Committee does not require them to have observer status to take part in the reporting procedure, they must have NGO status in their country of origin. Since many State parties have rigid requirements under their domestic law for registering an NGO, many organisations are prevented from accessing the reporting procedure. In practice, the reporting system suffers from huge delays, since States are often late in submitting their national reports.

2. The Arab Court of Human Rights

In 2014, the League of Arab States concluded the Statute of the Arab Court of Human Rights.[293] The Court's jurisdiction extends over disputes resulting from the interpretation and application of the Charter, or any other Arab convention in the field of human rights involving a member State (article 16). Moreover, upon request of the League of Arab States' Assembly, the Court may also issue an advisory opinion regarding any legal issues related to the Charter or to any other Arab convention on human rights (article 21).

The personal jurisdiction of the Court is severely limited, depriving individuals of the right to access it directly. According to article 19, only State parties may bring applications before the Court. State parties may accept, pursuant to a separate

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292 On the role of the claw-back clauses in the African Charter on Human and Peoples' Rights, see Rachovitsa, § 21.3, in this textbook. On the relationship between domestic and international law, see Kunz, § 5, in this textbook.

293 Council of the LAS Resolution no 7790 EA (142) C 3. Unofficial translation in English. For discussion, see Ahmed Almutawa, 'The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights' (2021) 21 Human Rights Law Review 506.

declaration, that a civil society organisation has standing to bring cases on behalf of individuals. As of yet, no States have ratified the Statute.

D. THE GCC DECLARATION ON HUMAN RIGHTS

In 2014, the member States of the Cooperation Council for the Arab States of the Gulf (GCC), namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates, adopted the GCC Human Rights Declaration.[294] The Declaration embodies an expression of the subregional level of human rights protection. The text consists of 47 provisions concerning civil and political rights and social, economic, and cultural rights. Some of these rights are novel, including article 39 which sets out a joint responsibility for the State and the community with regard to addressing the consequences of disasters and emergencies; and article 4 which criminalises trade in human organs but also frames it as a violation of human rights. With that being said, the GCC Human Rights Declaration overemphasises the role of domestic law when limiting human rights and subjects the exercise of human rights to Islamic law.

E. CONCLUSION

The development of the Arab/Islamic system on human rights gives rise to a polymorphous regionalism, wherein human rights documents and treaties capture different geographies and reflect various interests and priorities. The potential for certain novel provisions, as provided in the Arab/Islamic human rights instruments to support, in certain instances, different conceptualisations of human rights law remains largely unexplored in human rights law and practice. The restrictive scope of many of the human rights provided in the early Islamic human rights documents and the Revised Arab Charter on Human Rights and the subjection of the exercise of human rights to domestic law and/or Islamic law deviate from universal human rights standards. The ineffective functioning of international bodies casts a long shadow over the progressive development of human rights standards in the Arab/Islamic human rights system.

BOX 21.6.4 Further Readings

Further Readings

- AA An-Na'im, 'Human Rights in the Arab World: A Regional Perspective' (2001) 23 Human Rights Quarterly 701

294 Human Rights Declaration for the Member States of the Cooperation Council for the Arab States of the Gulf, adopted by the High Council, Thirty-fifth session, Doha, 9 December 2014.

- S Farrar, 'The Organisation of Islamic Cooperation: Forever on the Periphery of Public International Law?' (2014) 12 Chinese Journal of International Law 787
- MMO Mohamedou, 'Arab Agency and the UN Project: The League of Arab States Between Universality and Regionalism' (2016) 37 Third World Quarterly 1226

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§ 21.7 ASIAN HUMAN RIGHTS SYSTEM

ADAMANTIA RACHOVITSA

BOX 21.7.1 Required Knowledge and Learning Objectives

Required knowledge: Sources of International Law; Individuals; Recurring Themes in Human Rights Doctrine

Learning objectives: Understanding the reasons that the Asian human rights system takes a different path comparing to other regions; to become familiarised with the notion of Asian values in human rights law; to highlight the major human rights developments in the ASEAN.

BOX 21.7.2 Interactive Exercises

Access *interactive exercises for this chapter*[295] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

Asia is one of the regions in the world which lacks a regional system for the protection of human rights. A few remarks are warranted so as to understand why this is so. Any hastiness of the non-Asian observer in expecting of Asia what may be expected of other regions in the world may be misguided. Conceptualising Asia as a region, that is, a geographical area with sufficient historical, economic, social, religious, and cultural cohesion, is a complex matter.[296] Asia consists of a great number of States: 53 members of the Asia-Pacific Group at the UN, out of a 193

295 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

296 Antony T Anghie, 'Identifying Regions in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1058.

United Nations (UN) member States.[297] Asia is by far the most populous region in the world: 4.5 billion people out of 7.6 billion on the planet. Asia's self-identification as a continent is also subject to discussion.[298] Despite commonalities among States and peoples, the diversity within Asia is remarkable, perhaps inhibiting a systematic, coherent approach to regional development, at least in the form that this is witnessed in other regions.

The absence of regional human rights instruments and institutions needs to be also understood within the broader framework of Asian States' engagement with international law. Asian States are the least likely to accept international obligations. They tend to be mistrustful of delegating sovereignty, either on an international or regional basis. This is due to the diversity in the continent and the influences of the great powers (China, India, and Japan). Historical[299] and cultural reasons,[300] as well as the experience(s) of colonialism, should not be understated either (e.g. India and colonialism, China and unequal treaties,[301] the trials that followed the Second World War in Japan).[302] These experiences have cemented the perception that international law is primarily an instrument of political power to be used selectively.[303]

Against this background, regional human rights law in Asia is considerably less developed and amorphous compared to other regions. The deepening of human rights law is more likely to occur at the sub-regional level in smaller and more coherent groupings of States. At the same time, Asian States have existing human rights obligations under customary international law and under the UN human rights framework.[304]

First, this section briefly explains the concept and role of Asian values in human rights law and discourse. The discussion subsequently focuses on the sub-regional level for protecting human rights and, more specifically, the bodies and human rights instruments created by the Association of Southeast Nations (ASEAN).

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297 On the United Nations, see Baranowska, Engström, and Paige, § 7.3, in this textbook.

298 Teemu Ruskola, 'Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law' (2011) 44 University of California at Davis Law Review 879, 882; Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2016) 27 EJIL 945, 965.

299 On the history of international law, see González-Hauck, § 1, in this textbook.

300 'Culture' in Susan Marks and Andrew Clapham (eds), *International Human Rights Lexicon* (OUP 2005) 33, 39.

301 For the concept of unequal treaties and their function in the context of colonialism, see, Mathew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic Journal of International Law 335–382; Mitchell Chan, 'Rule of Law and China's Unequal Treaties: Conceptions of the Rule of Law and Its Role in Chinese International Law and Diplomatic Relations in the Early Twentieth Century' (2018) 25 Penn History Review 9.

302 Chesterman (n 298) 962–965. For discussion on the Third World approaches in international law (TWAIL), see González-Hauck, § 3.2, in this textbook.

303 Chesterman (n 298) 962–965.

304 For the ratification record of the main UN human rights treaties by Asian States, see Office of the United Nations High Commissioner for Human Rights, OHCHR Management Plan 2022–2023, Asia-Pacific, 154–155.On the UN human rights system, see Ananthavinayagan and Baranowska, § 21.2, in this textbook.

B. THE 'ASIAN VALUES' DEBATE

An infrequent occasion when Asian States formed and presented a united front on their position on human rights was their contribution to the 1993 World Conference on Human Rights. They drafted and submitted the Bangkok Declaration,[305] which embodies the so-called Asian values. 'Asian values' is a term coined by Asian officials to contest the Western conceptualisation of civil and political freedoms.[306] A major claim raised in this regard is that communitarian values and duties of the individual towards society should be placed on an equal footing to (or even take precedence over) individual freedoms. Paragraph 8 of the Bangkok Declaration reads:

> While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

The 1998 Asian Charter on Human Rights,[307] which is a peoples' charter drafted by civil society in response to the Bangkok Declaration, holds that the idea of 'Asian values' legitimises the 'deprivation of the rights and freedoms of . . . citizens, which are denounced as foreign ideas inappropriate to the religious and cultural traditions of Asia'.[308] A distinction is also drawn between Asian values as a 'thin disguise for . . . authoritarianism',[309] on the one hand, and the relevance of bearing in mind the social, economic, and cultural contexts in which rights are to be enjoyed, on the other.[310] In other words, it is not debated whether social, economic, and cultural contexts have a bearing on the enjoyment of rights (they do), but rather the specific weight of this bearing on the protective scope of rights as well as this weight's potentially disguised abuse for political purposes.

C. DEVELOPMENTS IN THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

While the number of human rights developments have taken place (e.g. South Asian Association for Regional Cooperation)[311] or are likely to take place (e.g. Pacific Islands Forum) in specific sub-regional corners of Asia, the Association of Southeast Asian

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305 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), Bangkok, 7 April 1993, UN Doc UNGA A/CONF.157/ASRM/8A/CONF.157/PC/59.

306 For critique on human rights and discussion of human rights as a colonial construction, see Ananthavinayagan and Theilen, § 21.8, in this textbook.

307 Asian Charter on Human Rights – A Peoples' Charter, Kwangju – South Korea, 17 May 1998.

308 Article 1(5).

309 Article 1(5).

310 Article 2(3).

311 Human rights treaties adopted under the auspices of the South Asian Association for Regional Cooperation are: the Social Charter, (adopted 4 January 2004); the Convention on Regional Arrangements for the Promotion of

Nations (ASEAN) stands out for its progress. ASEAN is a political and economic union created in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand, which were subsequently joined by Brunei, Vietnam, Laos, Myanmar, and Cambodia. In 2007, ASEAN member States decided to deepen their political, security-related, economic and socio-cultural cooperation by creating the ASEAN Charter. Respect for sovereignty, non-interference in domestic affairs, and the consensus approach remain the foundational principles of States' engagement.[312] In a surprising move, the protection of human rights and social justice features prominently in the purposes and principles of the ASEAN Charter. It was additionally agreed that a human rights body would be established, which eventually became the ASEAN Intergovernmental Commission on Human Rights (AICHR).

I. THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

The AICHR, established in 2009, is an intergovernmental, consultative body. Its decision-making is based on consultation and consensus, following a non-confrontational approach. The AICHR's mandate is to promote and protect human rights in the regional context, bearing in mind different cultural and religious backgrounds. Its tasks are promotional of human rights with no remit for receiving individual complaints or conducting investigations. According to its Terms of Reference,[313] the AICHR is tasked with:

- Developing strategies and capacity-building
- Consulting, and engaging in dialogue with other bodies and institutions, including civil society
- Enhancing public awareness of human rights.

The AICHR has been criticised for lack of engagement with civil society organisations and the general public.[314]

II. THE ASEAN HUMAN RIGHTS DECLARATION

Since the 1993 Bangkok Declaration, States in Asian and ASEAN fora have made many unsuccessful attempts to form a consensus on drafting a human rights instrument. These attempts came to fruition in 2012 with the adoption of the ASEAN Human Rights Declaration.[315] The Declaration, a non-binding instrument, provides for both civil and

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the Child Welfare in South Asia (adopted 5 January 2002); and the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (adopted 5 January 2022).

312 Vitit Muntarbhorn, 'The South East Asian System for Human Rights Protection' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 467.

313 See articles 1–4, 2009 Terms of Reference, adopted pursuant to article 14 of the ASEAN Charter.

314 Yuyun Wahyuningrum, 'A Decade of Institutionalizing Human Rights in ASEAN: Progress and Challenges' (2021) 20 Journal of Human Rights 158.

315 Association of Southeast Asian Nations, ASEAN Human Rights Declaration, adopted by the Phnom-Penh Statement, 18 November 2012.

political rights (articles 10–25) and economic, social, and cultural rights (articles 26–34), plus the right to development (articles 35–37) and the right to peace (article 38). Following in the footsteps of the Bangkok Declaration, the ASEAN Human Rights Declaration stresses that 'the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds' (article 7). The Declaration also emphasises that the enjoyment of human rights must be balanced with the performance of corresponding duties towards other individuals and the community (article 6). The rights are drafted almost telegraphically as to their protective scope, and the limitations on human rights provided are broad (article 8). This may be understandable since declarations are not commonly drafted in the same detail as treaties.

BOX 21.7.3 Advanced: Potential Normative, Legal, and Political Impact of the ASEAN Human Rights Declaration

Notwithstanding the absence of international obligations stemming from a declaration, the potential impact of non-binding instruments (soft-law) should not be dismissed altogether.[316] Other well-known examples of non-binding instruments (e.g. the Universal Declaration on Human Rights) have developed a significant normative impact. In this way, the ASEAN Human Rights Declaration, first, transforms human rights from a solely domestic concern into an issue to be addressed in inter-State relations; second, may form the basis for a treaty in the future; third, can be referenced and used before/by national bodies and in international practice; and fourth, legitimises human rights language for political debate at the domestic level.

III. OTHER ASEAN HUMAN RIGHTS BODIES AND INSTRUMENTS

A few other developments in the ASEAN should be noted.[317] The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, formally established in 2010, is a consultative, intergovernmental human rights body. It is tasked with promoting and protecting the human rights of women and children upholding rights contained in the Convention on the Elimination of All Forms of Discrimination against Women[318] and the Convention on the Rights of the Child[319] (all ASEAN member

316 Anthony J Langlois, 'Human Rights in Southeast Asia: ASEAN's Rights Regime after Its First Decade' (2021) 20 Journal of Human Rights 151.

317 For discussion on how the ASEAN human rights system informally evolves, see Tan Hsien-Li, 'Adaptive Protection of Human Rights: Stealth Institutionalisation of Scrutiny Functions in ASEAN's Limited Regime' (2022) 22 Human Rights Law Review 1.

318 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

319 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

States have ratified both treaties). Its functions are very similar to those of the AICHR and include:

- Promoting the implementation of international and ASEAN instruments on the rights of women and children
- Advocating on behalf of women and children
- Assisting, upon request by ASEAN member States, in fulfilling their international human rights reporting obligations on women and children's rights
- Encouraging ASEAN member States to collect and analyse sex-disaggregated data, and undertake periodic reviews of national legislation, policies, and practices related to the rights of women and children.[320]

Like the AICHR, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children does not have a specific mandate to receive and investigate (individual) complaints of human rights violations. Decision-making in the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children is based on consultation and consensus (see article 20 of the ASEAN Charter), which means that the Commission cannot act without the full agreement of all representatives.[321]

Finally, in 2007, representatives of the ASEAN member States adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.[322] The same year, the ASEAN Committee in the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers was created, mandated to ensure the implementation of commitments made under the previously mentioned Declaration as well as to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers.[323] In 2017, following ten years of negotiations, ASEAN States did adopt the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, a treaty that sets out standards for the treatment of migrant workers in source and destination countries.

D. CONCLUSION

In the ASEAN the development of human rights both on a substantive level and on an institutional level is notable. It remains to be seen though whether the ASEAN example can and will be extrapolated to other sub-regional corners in Asia. The so-called Asian values, as reflected in the Bangkok Declaration and the ASEAN Human Rights

320 ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, article 5, Terms of Reference, ASEAN Secretariat 2010.

321 Ibid, article 3.6.

322 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Cebu – Philippines, 13 January 2007.

323 Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Manila – Philippines, 31 July 2007.

Declaration, do not necessarily contest the universality of human rights law but rather aim at crafting more political and legal space for deference to national and regional particularities. With that being said, communitarian values or the role of duties of the individual hold conceptually certain untapped potential and therefore merit further study in human rights law.

BOX 21.7.4 Further Readings and Further Resources

Further Readings

- AT Anghie, 'Identifying Regions in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1058
- T Hsien-Li, 'Adaptive Protection of Human Rights: Stealth Institutionalisation of Scrutiny Functions in ASEAN's Limited Regime' (2022) 22 Human Rights Law Review 1
- Y Wahyuningrum, 'A Decade of Institutionalizing Human Rights in ASEAN: Progress and Challenges' (2021) 21 Journal of Human Rights 158

Further Resources

- The ASEAN Intergovernmental Commission on Human Rights publishes Annual Reports, Thematic Studies and Annual Activity Reports <https://aichr.org/reports/> accessed 20 August 2023
- YouTube video, Quick Facts About the Protection of Human Rights in ASEAN and by the ASEAN Intergovernmental Commission on Human Rights <www.youtube.com/watch?v=_gBYrWMyGC0&t=105s> accessed 20 August 2023

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§ 21.8 CRITIQUE OF HUMAN RIGHTS

THAMIL VENTHAN ANANTHAVINAYAGAN
AND JENS T. THEILEN

BOX 21.8.1 Required Knowledge and Learning Objectives

Required knowledge: International Human Rights Law

Learning objectives: Understanding how to question the progress narrative of human rights as always already pointing towards a better world; different strands of human rights critique.

BOX 21.8.2 Interactive Exercises

Access *interactive exercises for this chapter*[324] by positioning your smartphone camera at the dot-filled box, also known as a QR code.

Figure 21.1 QR code referring to interactive exercises.

A. INTRODUCTION

In the popular imaginary and in large parts of legal scholarship, human rights are thought of as an unquestioned social good: they have persisted as humanity's 'last utopia' and are believed to express our 'highest moral precepts and political ideals'.[325] Many of those who work within human rights institutions assume that human rights are inherently benign. Critique aims to disrupt that assumption. It thus performs a killjoy function[326] – it aims to disenchant human rights, to present them not as part of a progress narrative in which they are always already pointing towards a better world, but rather as one of many discursive spaces in which different visions of a just society may clash and be fought out.[327]

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324 https://openrewi.org/en-projects-project-public-international-law-international-human-rights-law/.

325 Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard UP 2012) 1, 4.

326 For the figure of the feminist killjoy, see Sara Ahmed, *Living a Feminist Life* (Duke UP 2017); in the context of human rights, see Jens T Theilen, *European Consensus between Strategy and Principle* (Nomos 2021) 412.

327 Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 Sydney LR 665, 668–673.

Critique in this sense takes a very different perspective from criticism of individual human rights decisions on the basis of legal doctrine.[328] The latter accepts the system of human rights law as given and merely aims to make minor adjustments on its own terms. By contrast, critique works to uncover the structure of human rights and their connection to other social phenomena, notably to relations of marginalisation, oppression, and exploitation.[329] Most critics of human rights share a commitment to radical social transformation in the face of a status quo that is perceived as fundamentally unjust. Beyond this, however, there are myriads of complex and diverse traditions of critique, with plenty of internal contradictions. We cannot do justice to all of these here, but merely aim to sketch some broad lines of thought building in particular on feminist, decolonial, and Marxist critiques.[330]

B. SOME CRITICAL LINES OF THOUGHT

I. HUMAN RIGHTS ARE NOT NEUTRAL OR APOLITICAL

Human rights are commonly understood as innate and inalienable. With this understanding comes a self-image of human rights as apolitical – they are said to be simply inherent in every human being, rather than being politically constructed. Contesting this self-image is a common starting point for critiques of human rights.[331] Understanding human rights as political opens up space to question the notion of the 'human' which is otherwise naturalised as self-evident, and to analyse the ways in which it is entangled with various structures of oppression.

BOX 21.8.3 Advanced: Struggles Around the Notion of the 'Human'

Feminists have pointed to the ways in which the ostensibly gender-neutral notion of the 'human' in fact privileges the male subject of human rights, for example by focusing on 'public' violations, while women's issues are consigned

328 On doctrinal perspectives on human rights, see Milas, § 21.1, in this textbook.

329 See for international law in general Robert Knox, 'Strategy and Tactics' (2010) 21 Finnish YBIL 193, 203; see also Susan Marks, *The Riddle of All Constitutions* (OUP 2000) chapter 6.

330 Other critical approaches include Critical Race Theory, critical disability studies, and queer theory. Labels such as these should not be taken as categorical divisions, however; there are overlaps, intersections and subfields as well as tensions and disagreements. For example, see E Tendayi Achiume and Devon W Carbado, 'Critical Race Theory Meets Third World Approaches to International Law' (2021) 67 UCLA L Rev 1462.

331 E.g. Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance' (2003) 41 Columbia Journal of Transnational Law 397, 420; Wendy Brown, '"The Most We Can Hope For . . .": Human Rights and the Politics of Fatalism' (2004) 103 SAQ 451, 453.

to the 'private' sphere.[332] Colonised peoples were often construed as outside of the notion of humanity altogether, a mindset that continues to resonate in the disregard for the lives of the 'Wretched of the Earth' in the Global South and the treatment of migrants of colour.[333]

In the context of international human rights law, the idea that human rights are apolitical carries particular weight since the legal form, too, is commonly construed as an antithesis to politics. Critiques of human rights in the legal context thus share ground with critical international legal theory more generally, insisting on the indeterminacy of (human rights) law and thus on the decisional, political aspect involved in any specification of its meaning: the content of human rights is not predetermined by law itself, but rather actively constructed by the actors involved in its formulation and interpretation.[334]

II. HUMAN RIGHTS AS COLONIAL

Once politics are admitted onto the scene, it also becomes possible to question the claims to universality commonly invoked in the discourse on human rights. Refusing to take universality as an apolitical given allows us to analyse the particular interests which are embedded within it. An especially stark instance of this is how claims to universality cover up the Eurocentric origins of human rights and their historical and ongoing use to legitimise (neo-)colonial domination by industrialised Western States.[335] The Third World Approaches to International Law (TWAIL)[336] perspective, in particular, 'helps one to be conscious of the oppressive potential of universality' and to 'scrutinise which aspects of human rights may be made universal and which aspects need to be re-examined'.[337]

Makau Mutua, to this end, sketches the savages-victims-saviours metaphor. This three-dimensional metaphor aims to capture a dynamic central to human rights discourse, in which the victim – a 'powerless, helpless innocent' – has her dignity and worth violated by the barbaric savage, necessitating intervention by the saviour or 'the good

332 Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613; on different figures of the 'woman' in human rights law, see Dianne Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and Its Others* (CUP 2006) 318, and below, B.II., on the figure of the female 'victim'.

333 See e.g. P Khalil Saucier and Tryon P Woods, 'Ex Aqua. The Mediterranean Basin, Africans on the Move and the Politics of Policing' (2014) 61 Theoria 55; for the phrase 'Wretched of the Earth' see Frantz Fanon, *The Wretched of the Earth* (Penguin 1967).

334 Martti Koskenniemi, 'The Effect of Rights on Political Culture' in *The Politics of International Law* (Hart 2011); Theilen (n 326).

335 Davinia Gómez Sánchez, 'Transforming Human Rights Through Decolonial Lens' (2020) 15 The Age of Human Rights Journal 276; see generally on critiques of ostensible universality e.g. Makau Mutua, 'What Is TWAIL?' (2000) 94 Proceedings of the ASIL Annual Meeting 31.

336 For discussion on the Third World approaches in international law, see González-Hauck, § 3.2, in this textbook.

337 Opeoluwa Adetoro Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10 ICLR 379, 384.

angel who protects, vindicates, civilizes, restrains, and safeguards' and who finds expression in the human rights corpus and its institutions.[338] The metaphor builds on colonial notions of civilisation and barbarism and in turn further solidifies 'the international hierarchy of race and color'.[339] It is also profoundly gendered: the 'Third World woman' is constructed as the paradigmatic victim subject that human rights law is thought to respond to.[340] Rights-based justifications for military interventions in the Middle East are an unsurprising continuation of these dynamics.[341]

However, the coloniality of human rights is not limited to the context of military interventions – rather, it is built into the manifold everyday contexts in which human rights are invoked, covering a wide range of subject matter and many international institutions. International financial institutions such as the International Monetary Fund and the World Bank,[342] in particular, make use of human rights and the language of 'good governance' to justify interventions in the political, social, and economic structures of Third World States.[343] Human rights thus remain entangled with (neo-) colonial forms of governance, and notably cannot be separated from the neoliberal economic regimes imposed on the Global South by international institutions.[344] At the same time, human rights have been used both by Third World States in attempts to emphasise political and economic self-determination vis-à-vis the Global North, and by academics, activists, and social movements seeking to contest authoritative regimes and abuses of power by Third World States themselves. Despite the coloniality of human rights, then, their liberatory promise – albeit so far unfulfilled and perhaps based, in the end, only on 'illusions of love or at least mutual interest'[345] – remains a recurring theme. We will return to this ambivalence in the concluding section below.

III. HUMAN RIGHTS AS A LEGITIMATION OF THE STATUS QUO

Several interrelated lines of critique focus on how human rights tend to legitimise the status quo and thus preclude social transformation. For one thing, any demarcation of

338 Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201, 203–204.

339 Ibid, 207.

340 Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/ Post-Colonial Feminist Legal Politics' (2002) 15 Harvard Human Rights Journal 1; see also Chandra Talpade Mohanty, *Feminism without Borders* (Duke University Press 2003); for an analysis of similar dynamics in the context of LGBT rights, see e.g. Cynthia Weber, *Queer International Relations* (OUP 2016).

341 See e.g. Vasuki Nesiah, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice' (2004) 17 Harvard Human Rights Journal 75.

342 On international monetary law, see Bagchi, § 23.3, in this textbook.

343 Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 TWQ 739, 749.

344 See also e.g. Upendra Baxi, *The Future of Human Rights* (3rd edn, OUP 2008); Jessica Whyte, *The Morals of the Market. Human Rights and the Rise of Neoliberalism* (Verso 2019); Radha D'Souza, *What's Wrong With Rights? Social Movements, Law and Liberal Imaginations* (Pluto Press 2018).

345 Nikitah Okembe-Ra Imani, 'Critical Impairments to Globalizing the Western Human Rights Discourse' (2008) 3 Societies Without Borders 270, 271.

what human rights are necessitates an assessment of what they are *not* – and given the high moral value generally accorded to human rights, refusal to see claims that involve social transformation as an issue of human rights will often delegitimise those claims.[346] But the status quo can also be reinforced, and perhaps even more potently so, by virtue of what *is* considered a human right. Once elements of the current social order are integrated into the institutionalised human rights framework, they become extremely difficult to challenge.[347]

BOX 21.8.4 Advanced: Human Rights Entrenching Social Relations

The right to property may be considered the paradigmatic example of this, since it can transparently serve to impede claims to economic redistribution as well as hindering various other large-scale policy changes, which run counter to corporations' established interests. Marxist critiques have long argued that the dominant understandings of human rights are constitutive of the social relations of capitalism.[348] Human rights law also cements many other foundations of the current social order. For example, it foregrounds the nuclear family and the institution of marriage as foundational units of society. Queer critique not only takes issue with the way in which marriage is still understood in hetero- and cisnormative terms by prevailing doctrine, but it also questions the prevalence of marriage as such over other forms of kinship and community.[349] Another example is the normalisation of the prison-industrial complex through human rights. While certain prison conditions might be the subject of rights-based scrutiny, human rights courts simultaneously require States to criminalise an ever-increasing range of behaviours.[350] It thus becomes more difficult to mount prison abolitionist claims,[351] since States will point to their human rights obligations to justify a coercive approach.

346 Frédéric Mégret, 'The Apology of Utopia' (2013) 27 Temple International and Comparative Law Journal 455, 488.

347 On the double-bind this creates, see Jens T Theilen, 'The Inflation of Human Rights: A Deconstruction' (2021) 34 LJIL 831, 850.

348 Paul O'Connell, 'On the Human Rights Question' (2018) 40 HRQ 962, 966–967.

349 Ratna Kapur, *Gender, Alterity and Human Rights. Freedom in a Fishbowl* (Edward Elgar 2018) chapter 2; Aeyal M Gross, 'Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' (2008) 21 LJIL 235, 245–249; Dean Spade, 'Under the Cover of Gay Rights' (2013) 37 NYU Review of Law & Social Change 79.

350 Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069; Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 HRQ 729; Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR* (Hart 2021) chapter 6.

351 On prison abolition, see Angela Y Davis, Are Prisons Obsolete? (Seven Stories Press 2003); Mariame Kaba, *We Do This 'Til We Free Us. Abolitionist Organizing and Transforming Justice* (Haymarket 2021).

A further way in which human rights law may reinforce the status quo relates to the patterns of analysis it brings with it. In particular, human rights law aims to establish whether a rights violation has taken place with little attention to underlying structures which bring about and perhaps even necessitate such violations. Even when the causes of human rights are investigated, the focus tends to be more on superficial causes, which can be 'translated into remedial proposals, themselves capable of being translated into bullet-point conclusions at the end of reports'.[352] Often, integration into global markets is presented as a way to empower rights holders, with insufficient attention paid to the power dynamics within markets themselves and to the impact of neoliberal globalisation, which has contributed to the deterioration of living conditions across the globe and especially in the Global South. By virtue of the way judgments, reports, and other documents structure human rights law, then, root causes like the socio-economic conditions underlying human rights violations tend to remain unexamined[353] – and thus unchallenged.

IV. WHO SPEAKS IN THE NAME OF HUMAN RIGHTS?

The proliferation of formal documents like judgments and reports within institutionalised human rights brings us to a related point: who speaks in the name of human rights? Postcolonial feminist Gayatri Spivak famously asked whether the subaltern can speak – and answered in the negative, indicating that the impossibility of speaking constitutes the position of the subaltern subject.[354] This provocation raises questions not only about speaking or not-speaking but also about being heard or not-heard. More generally, it draws our attention to the relationships of (knowledge) production which prefigure discursive fields such as human rights.[355]

In this vein, a common critique of human rights – at least in their institutionalised form – is that they have become a language of legal experts.[356] Human rights are thus conceived of as a managerial issue, an aspect of governance: 'normative standards to guide administrative actions and less and less the basis for justice'.[357] This not only

352 Susan Marks, 'Human Rights and Root Causes' (2011) 74 MLR 57, 71–72; see also Wendy Brown, '"The Most We Can Hope for . . .": Human Rights and the Politics of Fatalism' (2004) 103 SAQ 451, 460.

353 David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, especially 109–110 and 118–119.

354 Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Patrick Williams and Laura Chrisman (eds), Colonial Discourse and Post-Colonial Theory. A Reader (Columbia UP 1994) 66.

355 See Sara Ahmed, *Strange Encounters. Embodied Others in Post-Coloniality* (Routledge 2000) 60–61.

356 For a detailed exploration of expertise as a governance feature in the context of rights, see Bal Sokhi-Bulley, 'Government(ality) by Experts: Human Rights as Governance' (2011) 22 Law & Critique 251; on expertise and managerialism in international law more broadly, see Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 EJIL 7.

357 Radha D'Souza, *What's Wrong With Rights? Social Movements, Law and Liberal Imaginations* (Pluto Press 2018) 18.

obscures their political character, it also establishes certain professional standards for how to think and talk about human rights and sidelines those actors who fail to live up to these expectations. While processes of public consultation on human rights issues are common, they tend to focus on 'civil society' in the shape of large, well-funded non-governmental organisations[358], usually based in (or funded by actors based in) the Global North.[359] Differently put: while human rights institutions have much to say about how to improve the plight of those one might deem subaltern, they rarely seek to listen to them.

C. CONCLUSION

The question of what comes after critique is a difficult one. Having delivered often searing critiques of human rights, many writers end on a hopeful note – they end up 'attempting to reimagine (and in doing so, reinforce) the human rights project itself'.[360] But perhaps such a turn to reimagination and hope is misplaced, a form of cruel optimism?[361] After all, reimagining human rights in a more emancipatory vein cannot displace their legal, institutional, and material realities and the various ways in which they help to constitute relations of marginalisation, oppression, and exploitation.[362] But it is also true that human rights are invoked outside of institutions by a broad variety of political and social movements, asserted in resistance to market logics and forming part of a struggle to survive in the face of global capitalism.[363]

It is from within this space of ambivalence that we suggest approaching human rights, which implies a high measure of caution as to their emancipatory potential when institutionalised within international law. For human rights to become truly international, we would need engagement with the Global South, beyond those elites who tend to play a role in the legal context.[364]

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358 On NGOs, see Chi, § 7.6, in this textbook.

359 Upendra Baxi, *The Future of Human Rights* (3rd edn, OUP 2008) 218–219; Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (Asser 2012) 3, 10–11 and 13–14.

360 Ben Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2 LRIL 77, 79; for different perspectives on this issue, see e.g. Ratna Kapur, *Gender, Alterity and Human Rights. Freedom in a Fishbowl* (Edward Elgar 2018); Kathryn McNeilly, *Human Rights and Radical Social Transformation* (Routledge 2018).

361 Lauren Berlant, *Cruel Optimism* (Duke UP 2011).

362 Radha D'Souza, *What's Wrong with Rights? Social Movements, Law and Liberal Imaginations* (Pluto Press 2018).

363 Paul O'Connell, 'On the Human Rights Question' (2018) 40 HRQ 962; on social movements, see also Balakrishnan Rajagopal, *International Law from Below* (CUP 2003).

364 Thamil Venthan Ananthavinayagan, *Sri Lanka, Human Rights and the United Nations – A Scrutiny into the International Human Rights Engagement with a Third World State* (Springer 2019) 247.

BOX 21.8.5 Further Readings

Further Readings

- U Baxi, *The Future of Human Rights* (3rd edn, OUP 2008)
- R D'Souza, *What's Wrong With Rights? Social Movements, Law and Liberal Imaginations* (Pluto Press 2018)
- R Kapur, *Gender, Alterity and Human Rights. Freedom in a Fishbowl* (Edward Elgar 2018)
- S Marks, 'Human Rights and Root Causes' (2011) 74 MLR 57
- M Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201

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